85-275

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARLOS G. GAY
Petitioner,

V.

COATS & CLARK, INC.
and
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
and
WHIRLPOOL CORPORATION
and
ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether certiorari should be granted for the United States Supreme Court to exercise its supervisory powers over the federal judiciary by resolving conflict and re-establishing uniform guidelines for courts of appeal to implement the requirement of judicial impartiality?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for writ of certiorari are set forth in the caption of the petition.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Carlos G. Gay, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on March 25, 1985 on which a timely petition for rehearing was denied May 13, 1985.

OPINIONS BELOW

The March 25, 1985, opinion of the Court of Appeals, is reported at 755 F.2d 1506 and is reprinted in the Appendix to this Petition (App. A). The order denying petition for rehearing is reprinted in the Appendix (App. F) but is unreported. The judgments of the United States District Court for the Middle District of Georgia, entered December 14, 1983, without opinion, are also reprinted in the Appendix (App. C and App. E) but are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 25, 1985. Timely petition for rehearing was denied May 13, 1985. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States, and the following statutes and rules, each of which, in pertinent part, is set forth below:

U. S. Const. amend. V

> No person shall... be deprived of life, liberty, or property, without due process of law; ...

Title 28, United States Code
Section 1254(1)

> Cases in the courts of appeal may be reviewed by the Supreme Court

by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree;

Title 28, United States Code, Section 455(a)

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

United States Supreme Court Rule 17.1.(a)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

On June 29, 1982, Coats & Clark, Inc., a thread manufacturer incorporated under the laws of the State of Delaware, brought a diversity action against Carlos G. Gay, a Thomas County, Georgia, resident and the sole proprietor of General Bonded Warehouse. The action arose from a fire that occurred on Sunday, March 14, 1982, which destroyed Gay's warehouse and cotton belonging to Coats & Clark, Inc. which was stored in it. The basis of the complaint was the alleged negligence of Gay in turning off a damaged warehouse sprinkler system and in failing to post a watchman or take other precautions over a weekend to protect stored goods against fire pending repair of the system. As insurer and subrogee, The State of Pennsylvania Insurance Co., ultimately joined Coats and Clark, Inc. as a party plaintiff.

Gay filed an answer and counterclaim in which he contended that it was the negligence of Coats & Clark, Inc. which was the proximate cause of the fire (alleging Coats either brought in "hot bales" already latently smouldering within or engaged in improper sampling processes which involved causing "sparking" metal bands to snap, without advising Gay of the danger thereof).

Whirlpool Corporation had appliances stored in Gay's warehouse on March 14, 1982. It also sued Gay for damages to its property and was ultimately accompanied as a party plaintiff by its insurer-subrogee, Arkwright-Boston Manufacturers Mutual Insurance Co.

Coats & Clark, Inc. moved for summary judgment on Gay's counterclaim on April 29, 1983 and Gay filed a response and countervailing affidavit to this motion,

but the trial court ultimately granted the plaintiff's motion for summary judgment, dismissing Gay's counterclaim and leaving Gay with an affirmative defense of negligence against Coats & Clark, Inc. but no affirmative action to recover for Gay's own losses.

The consolidated cases came on for trial before the court and a jury on November 28, 1983. After a lengthy trial, resulting in a transcript of 1415 pages, a jury verdict was returned on December 5, 1983 in favor of Coats & Clark, Inc. in the amount of $803,281.32 plus 7% interest, specifically stating it was a "50%" verdict. App. B. The trial court subsequently entered judgment on that verdict in the amount of $900,486.39 with interest at 9.86% on December 14, 1983. App. C. Motion for a new trial was overruled and notice of appeal was then filed. The jury

also returned a verdict for Whirlpool in the amount of $55,513.00 plus 7% interest. App. D. The trial court adjusted this verdict to a judgment in the amount of $62,413.01 with 9.93% interest. App. E. Motion by Gay for a new trial was overruled, notice of appeal was timely filed, and the consolidated cases were briefed and argued by all parties.

Despite having been cited twenty-one (21) incidents involving the trial judge's apparent antagonism toward Gay and noting "the sarcasm, the open expressions of impatience and the intemperate and facetious remarks" of the trial judge toward Gay and his counsel, the Eleventh Circuit affirmed the judgment of the trial court by panel decision rendered March 25, 1985, in the consolidated cases in Coats & Clark, Inc. et al. v. Gay, 755 F.2d 1506, 1512 (11th Cir. 1985). App. A. With

respect to the issue of judicial partiality, noting the absence of contemporaneous objection, the court of appeals, through Senior District Court Trial Judge Lynne (sitting by designation) recognized that "the trial judge stepped close to the line of neutrality" but declined to find "plain error". 755 F.2d at 1512; App. A, p. 21a.

Upon Gay being informed of the unavailability of prior appellate counsel to continue in the case, the undersigned new counsel was engaged. A timely petition for rehearing was filed, citing numerous additional examples of the lack of judicial impartiality, but it was denied on May 13, 1985. App. F.

A Petition for Writ of Certiorari was filed in this Court in a timely manner on August 12, 1985.

REASONS FOR GRANTING WRIT

CERTIORARI SHOULD BE GRANTED FOR THE UNITED STATES SUPREME COURT TO EXERCISE ITS SUPERVISORY POWERS OVER THE FEDERAL JUDICIARY BY RESOLVING CONFLICT AND RE-ESTABLISHING UNIFORM GUIDELINES FOR COURTS OF APPEAL TO IMPLEMENT THE REQUIREMENT OF JUDICIAL IMPARTIALITY.

Even if conflict did not exist, this Court should grant certiorari to exercise its supervisory powers over the federal judiciary. As this Court stated in its landmark decision on the subject, the trial judge's

> privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'... It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf.

Quercia v. United States, 289 U. S. 466, 470 (1933) (citations omitted). The Eleventh Circuit decision sought to be

reviewed herein referred to Quercia. However, since Quercia included contemporaneous objections by counsel to the remarks of the trial court judge, its impact seems to have been blunted as the Eleventh Circuit retreated behind the requirement of "plain error". Despite widespread and diversified indications of lack of impartiality that were displayed before the jury (see Appendix G and text, infra), after noting that the judge's interjections were not "directly denigrating," the court of appeals would go only so far as to say that "the trial judge stepped close to the line of neutrality" but "did not step over it. There was no plain error requiring a reversal." 755 F.2d at 1511-1512; App. A, pp. 20a-21a. (Emphasis supplied).

In doing so, the Eleventh Circuit completely ignored the implied test of even-

handedness in treatment of witnesses recognized by the Second Circuit in United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1969), by the First Circuit in Crowe v. Di Manno, 225 F.2d 652, 658 (1st Cir. 1955), and by the District of Columbia Circuit in Peckham v. United States, 210 F.2d 693, 702 (D.C. Cir. 1953). Both Grunberger, in which the contrast pertained to treatment of witnesses, and Peckham (which added degrading and belittling remarks directed at defense counsel) involved reversals despite the fact that there apparently were no contemporaneous objections or requests for cure.

In view of the contrasting incidents set forth in Appendix G, many of which are also discussed herein below, the Eleventh Circuit should have gone beyond the question of actual bias and beyond the requirement for conclusive evidence of

juror prejudice and "endeavored to prevent even the probability of unfairness." In Re Murchison, 349 U.S. 133, 136 (1955). It is fundamental that the trial court must at all times strive for that "atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding". Glasser v. United States, 315 U.S. 60, 82 (1942). For even before Quercia, this Court had stated the edict that

> the tribunals of the country shall not only be impartial in the controversy submitted to them but shall give assurance that they are impartial ...from any single bias or prejudice that might disturb the normal course of impartial judgment.

Berger v. United States, 255 U.S. 22, 35-36 (1921). (Emphasis supplied).

Unfortunately, from the scores of cases examined during the preparation of this petition, it appears that there is such strong reliance upon the principle that "each case necessarily turns on its own

facts," United States v. Socony-Vacuum Oil Co., Inc. et. al, etc., 310 U.S. 150, 240 (1940), that there is a distinct tendency on the part of the judiciary to "judge not" one another rather than to "avoid even the appearance of impropriety". Petitioner concedes that each case must turn on its own facts. However, Petitioner contends that the judicial system is not well served when the "test" of impartiality applied by reviewing tribunals puts the burden on an aggrieved Petitioner, whose trial counsel have made no contemporaneous objection, to prove actual partiality or prejudice.

Considering the rightful but potentially dangerous power of life-time appointed trial court judges, it is incumbent upon this Court to clarify and emphasize again the right of each party litigant to the appearance of impartiality by tipping the

scales in favor of reversal in cases where the presiding judge has, at the very least, "stepped close to the line of neutrality".

A. The Opinion Of The Eleventh Circuit Below Conflicts With Prior Opinions Of This Court, Of The Second Circuit, And Of Other Circuits, By Its Failure To Recognize The Presence In This Case Of The Proper Elements Of Plain Error, Thus Resulting In A Denial Of Petitioner's Fifth Amendment Right To Due Process of Law.

The decision of the court of appeals to affirm the trial court in this case is in conflict with the original guiding principles set forth by this Court as briefly stated above. However, it is also in conflict with numerous decisions from other judicial circuits, but none so much as the Second Circuit. That circuit has recognized at least five different categories of conduct by a trial judge seen as evidence of lack of neutrality, each of which has been used as a basis for reversal. The case at bar has elements of all

five and thus, although each case turns on its own facts and the actions of the trial judge may not rise to the same level as those criticized in any one specific category, since all five categories recognized by the Second Circuit are met in this case, it must be supposed that the Second Circuit would have reversed under these facts. The following five categories of conduct and their factual correspondent incidents will be discussed seriatim.

1. Marked impatience.

When combined with repeated rebukes and disparaging remarks directed at counsel, it was noted in United States v. Coke, 339 F.2d 183, 185 (2d Cir. 1964), that "marked impatience...in the presence of the jury" would be interpreted as a display of "an attitude of partisanship which resulted in the denial of a fair trial and a deprivation of due process of law." All of the

transcript must be read as a whole to see the contrast between the patience of the trial judge toward Coats & Clark and Whirlpool and their respective attorneys, Withers and Roberson, against the marked impatience toward Gay and his attorneys, Eckl and McKinley. However, there is one particularly stark example.

The trial judge went out of his way to elaborate on why he was going to permit the plaintiffs, with consent of opposing counsel, to present a witness out of turn "because of difficulties about a witness not being available right at this minute." (T-610, L.9-18 reprinted in Appendix G, p.29g.) On the other hand, when defendant, Gay, sought the same courtesy, apologizing through his counsel (McKinley) who advised the court that his next witness was scheduled to arrive in eight minutes, the court responded:

> THE COURT: Well, we are not going to wait on him. We are not going to wait on him. We don't wait on witnesses.

The entire colloquy of T-1199, L.21 through T-1200, L.3 are set out in Appendix G, pp. 40g-41g. Thereafter, when his attorney recalled Carlos Gay to the stand and began questioning him further about the Coats & Clark's "snapping bands", which Gay contended had sparked and set the fire, the judge literally ordered Gay from the stand without even allowing his counsel to respond to the accusation that he was "filibustering". T-1203, L.17 - T-1204, L.20 reprinted at App. G, pp. 45g-46g. All this occurred in the presence of the jury and was even the more remarkable because counsel for Coats & Clark have admitted at page 32 of their Eleventh Circuit "Brief of Appellees" that they had agreed to a recess for the benefit of defendant, Gay, but the court did not

agree! See App. H. Other examples are discussed, infra, under "Contrasting Treatment of Witnesses".

2. Contrasting Treatment of Witnesses

The Second Circuit further recognized in United States v. Grunberger, supra at 1068, that where the trial judge was vigorously active and interruptive toward one party but passive and "far more patient and moderate" with the other, this would be seen as a basis for reversal notwithstanding counsel's failure to object. For similar commentary and result by the First Circuit, see Crowe v. Di Manno, 225 F.2d 652, 658 (1st Cir. 1955).

It would not be possible to set forth all the indications of contrast contained in a transcript of over 1,400 pages. However, the following are representative examples:

The judge was patient, with plaintiff's

expert on direct, at T-404, L.17-20:

> THE COURT: I want to ask him something there that really doesn't have anything to do with the trial of the case, but I'm just curious about it.

The line of irrelevant questioning, including joking with counsel, continued through and including T-406, L. 6-11 which are reprinted in App. G, p. 28g, infra.

On the other hand, he was impatient with defendant's expert on re-direct:

> THE COURT: Can't we just cut it short? This ten-minute witness has already taken 40 minutes. This was a ten-minute witness, by the way. It's already taken 40.

See: T-1238, L. 7-20 reprinted at App. G, p. 48g.

Again, he was gracious while helping plaintiff's expert, Thomas, avoid defendant's cross-examination. After reserving ruling on documents sought to be introduced through cross and telling Gay's attorney, Eckl, he could proceed with a line of questioning of plaintiff's expert,

the court suggested:

> THE COURT: The witness may say he doesn't know anything about it anyway. That would solve the whole thing, wouldn't it? (Emphasis added).
>
> MR. ECKL: Please don't suggest to him...
>
> THE WITNESS: Well, I've heard enough.

The witness thereafter denied knowledge. T-366, L.2-24 (not reprinted).

Consider the court's lack of action which favored plaintiff's ability to exclude defendant's expert at T-1184, L.19-23, App. G, p. 38g: The normally "active" trial judge admitted he saw a man (Gay's expert, Adams) wander into the courtroom, (after plaintiffs had rested and Gay was on his case in chief) and that he "wondered if he was--who he was" (presumably, whether he was a witness). But despite his active intervention at other times to control his courtroom, he failed to inquire and allowed him to become potential-

ly "contaminated" as a witness, then said he'd exclude testimony if he were.

Immediately following the above, the judge gave indication of pre-disposition to grant new trial if defendant's "contaminated" expert, Adams, testified and if plaintiffs were to lose the trial. T-1186, L.1-6, 13-16 reprinted at App. G, p. 39g.

Trial Judge Elliott seemed to be against Gay's main expert, Donnelly, on cross at T-1132, L.14-23, when on his own motion, the judge gratuitously cut defense expert Donnelly short as he tried to explain his qualifications as an expert. App. G, p. 37g.

He also seemed antagonistic toward Gay's other expert, Adams, on direct at T-1213, L.14-16, when on his own motion, the court interrupted and cut him short as he tried to explain that the broad range of his experience included nuclear plant sprink-

ler systems. App. G, p. 47g.

Another contrast revealed that the judge allowed plaintiff's counsel, Withers, to use or elicit from Gay repeatedly (6 times) his testimony in terms of what he "believed" to be true while under cross-examination by plaintiffs. T-151, L.5; T-153, L.19; T-155, L.7-9; T-166, L.15-19; T-193, L.10-12; T-803, L.2-7 reprinted at App. G, pp. 14g-16g. He even allowed counsel for plaintiff to couch his leading questions to Gay five (5) times in terms of what he suggested Gay "believed" T-167, L.18-20; T-188, L.21-23; T-189, L.8-11; T-190, L.6-9; T-193, L.13-15 reprinted at App. G, pp. 18g-19g. But he immediately, gratuitously, objected on his own motion to Mr. Gay's use of the word "believe" on direct, encouraging plaintiff's counsel to object to it. T-1202, L. 9 through T-1203, L. 1 reprinted at App. G, pp. 43g-44g. With defendant

apparently trying, in accordance with Fed R. Evid. 701(a) to explain his theory of the snapping bands, his counsel was not even permitted to explain his purpose before Gay was driven from the stand. T-1203, L.17 - T-1204, L.20. reprinted in App. G, pp. 45g-46g.

Ever sympathetic to the plaintiffs, the judge voluntarily clarified the meaning of plaintiff's counsel's line of questioning having to do with "security" meaning "stability" of cotton stacks. T-162, L.6-13 reprinted at App. G, p. 17g.

He also voluntarily stepped in to closely cross-examine Gay's expert, Donnelly on "inferences". T-1115, L.14 - T-1116, L.9 reprinted at App. G, pp. 34g-35g.

Nevertheless, rather than helping, he clouded issues and declined to clarify testimony for Gay at T-176, L.4-18, when Gay, on cross, began to testify that he

observed Coats and Clark employees cut bands to sample bales in the warehouse. The judge, without ruling it to be "stricken", confused and defused its meaning by remarking: "I don't know what he's saying." Obviously, Gay was laying a foundation for the point that sparks could have been caused. The judge was under no "obligation" to clarify but was also under no obligation to "comment" negatively. He did clarify various items for plaintiffs as shown above. App. G, p. 20g.

Yet, he refused to make plaintiff's counsel clarify a confusing cross-examination of Gay, even upon request. When defendant's counsel clearly read and used a deposition out of context in his cross of Gay as an adverse witness, the court refused to require clarification, refused to look at the deposition, and refused to admonish plaintiff's counsel,

simply allowing that Defendant could "bring it out later". This refusal to clarify would have been fine if it had been "even-handed" in its application but it was not. T-182, L.4 - T-183, L. 19 reprinted at App. G, pp. 21g-23g.

3. Criticism of counsel.

In three separate opinions, the Second Circuit has reversed while noting as a primary ground the criticism of counsel by the trial judge. United States v. Persico, 305 F.2d 534, 540 (2d Cir. 1962); United States v. De Sisto, 289 F.2d 833, 835 (2d Cir. 1961); and United States v. Ah Kee Eng, 241 F.2d 157, 161 (2d Cir. 1957). In Persico and De Sisto, the question of contemporaneous objection did not seem to have been important. In Ah Kee Eng, it was noted that:

> A less experienced advocate might well have trimmed his sails to such a judicial wind as prevailed in the courtroom during this trial, and thus

> have jeopardized the rights and proper interests of a defendant on trial for a serious felony. Fortunately for this defendant his counsel continued to object....

Ah Kee Eng at 161. Cf. Whitaker v. Mc Lean, 118 F.2d 596 (D.C. Cir. 1941).

While the court of appeals in each of the above cases found more egregious circumstances than the record here would reveal, it clearly established the element of criticism of counsel which was certainly suffered by counsel for Carlos G. Gay and showed up in marked contrast to the joking relationship enjoyed by Mr. Withers, in particular, as counsel for Coats & Clark. See, for example, the repeated accusation against Gay's counsel, McKinley, that he was "filibustering" as set forth at T-1203, L.17 through T-1204, L.20, reprinted at App. G, pp. 45g-46g. The circumstances giving rise to the foregoing incident were more fully described above.

Earlier in the trial, it was Gay's other attorney, Mr. Eckl, who became the subject of less caustic but clearly unnecessary criticism. When plaintiff's counsel, Mr. Withers, attempted to inquire as to who had hired expert witness Donnelly (in an attempt to bring forth information that he was hired by Gay's insurance company) Mr. Eckl requested to approach the bench. Instead, before Eckl could reach the bench, the court accused:

> Well, you questioned the expert witnesses put on the stand by the other side about who employed them, even about how much they were paid an hour and so on. He would have the same right.

T-1120, L.3-14 reprinted at App. G, p. 36g. After a bench conference, the court saw the light but the damage to Eckl's image had already been done.

The foregoing incidents might have seemed less important if the court had treated opposing counsel in a similar

manner. But in contrast, Judge Elliott helped Withers clarify his questions (T-162, L.6-13 reprinted at App. G, p. 17g), defended his right to inquire for "other reasons" into an area already excluded in advance from consideration at trial (T-137, L.11-25 reprinted at App. G, p. 10g), and even permitted him the luxury of making jokes at the expense of the court:

> MR. WITHERS: Mr. Peterson, please don't tell the Court any of his questions are simple. (laughter)
>
> THE COURT: I noticed he said that was simple.
>
> MR. WITHERS: Fascinating is a better word. (laughter)

T-406, L.6-11 reprinted at App. G, p. 28g.

Although the jury certainly must have observed the difference in the attitudes of the trial judge toward opposing counsel, the issue of intimidation of counsel raised in Ah Kee Eng, supra at 161 may have also been critical here. The

opinion of the Eleventh Circuit below indicated that it would have applied different standards in ruling on three of the four points on appeal if defendant, Gay, (who was obviously relying on his defense counsel), would have done any of the following acts:

a. Made a more detailed offer of proof concerning the warehousing activities of Coats & Clark. 755 F.2d at 1511 reprinted at App. A, pp. 15a-16a.

b. Moved for a directed verdict or for judgment notwithstanding the verdict at the close of all the evidence. 755 F.2d at 1512 reprinted at App. A, pp. 21a-22a. As the Court of Appeals went on to state at page 1513, reprinted at App. A, p. 24a:

> In any event, since he (his counsel) did not raise the sufficiency-of-the-evidence issue in the court below, his argument will not pass muster under the 'any evidence' standard. (Parenthetical remarks added).

It should be noted that, of the two defense attorneys actively handling the trial, only Mr. McKinley returned after the weekend recess to be present for the verdict. It is logical to conclude that the embarrassment and intimidation he had suffered near the end of the trial (see App. G, pp. 40g-46g) would have reduced the likelihood that a timely motion for judgment notwithstanding the verdict would have been made by him after the verdict.

c. Made one or more objections as to the "remarks of the trial judge" which Gay now insists were prejudicial. For lack of objection, the court of appeals clearly limited consideration to "plain error".

Considering the attitude of the trial judge throughout the case, including the fact that outside the presence of the jury he had been telling Gay's counsel that they were "spinning their wheels" (T-1258,

L.8-21 reprinted at App. G, p. 49g), it is quite possible that the trial judge's conduct caused Gay to receive less than the best his counsel had to offer. The indirect but cumulative prejudicial impact was not merely the denial to Gay of a fair and impartial trial but also a reduction of opportunity for more favorable consideration from the court of appeals. This is merely one more reason why this Court should clarify the test for impartiality of a trial judge and tip the scales in favor of the aggrieved party.

4. Mentioning of insurance company.

Although the reversal seemed to be based upon the totality of the "atmosphere of the courtroom" which was said to depend "primarily upon the judge", the mention of insurance was not actually made by the judge in Brown v. Walter, 62 F.2d 798, 800 (2d Cir. 1933). Nevertheless, that

circuit came down hard on the court for allowing insurance to be mentioned in a summation and it would appear that they would come down even harder on the judge for mentioning it himself. Although Brown was an automobile accident case, it would seem that the mention of insurance would be no less damaging in a fire case.

In the case for which certiorari is being requested, the trial court continued to be less than even-handed on the subject of insurance. First, it would appear that he unnecessarily connected Hanover Insurance Company to being "interested" in the outcome of the case "from the standpoint of the defendant, Mr. Gay" during the voir dire conducted by the court. T-19, L.17-24 reprinted at App. G, p. 1g. Later on, as previously noted, the court overtly defended in the hearing of the jury the right of counsel for Coats &

Clark to inquire into the employment of Gay's expert witness, Donnelly, in an apparent effort to show he was employed by Hanover Insurance Company. T-1120, L.3-14 reprinted at App. G, p. 36g. In contrast, during the jury charge, the court seemingly "belittled" the involvement of the two insurance companies named as parties plaintiff as being "technical" and declined to mention them further by name as "plaintiffs" throughout the remainder of his charge. T-1358, L.2-14 reprinted at App. G, p. 50g.

5. Derogation of defendant's testimony.

Of course, Quercia, supra, is the best known case concerning judicial comment in derogation of a defendant's testimony. Although Judge Elliott never referred to what Mr. Gay was doing with his hands, as did the judge in Quercia, his attitude and comments do appear to call for the appli-

cation of the principles of Quercia such as the following:

> It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf.

Quercia v. United States, 289 U.S. at 470. In Quercia, it is reported that the defendant "excepted" to the charge and, presumably, a contemporaneous objection was made.

Following Quercia, the Second Circuit reversed by reason of the "gratuitous and unnecessary comments which sarcastically and relentlessly discredited Salazar (the defendant)" notwithstanding the apparent lack of contemporaneous objection. United States v. Salazar, 293 F.2d 442, 444 (2d Cir. 1961). Although there were other factors involved as well, Salazar clearly stands for the proposition that the Second Circuit will reverse for derogation of a defendant's testimony by a trial judge.

Certainly, petitioner does not suggest that the trial court was ever so crude as to fit squarely within the ambit of either Quercia or Salazar. Judge Elliott is known to be a distinguished jurist. His comments and conduct toward Gay were less direct and not totally unprovoked. Nevertheless, the court did engage in uncalled for commentary which blunted the testimony of Mr. Gay. T-176, L.4-18 reprinted at App. G, p. 20g. He gratuitously characterized Gay's responses rather than merely ruling on objections. T-130, L.19-25 reprinted at App. G, p. 5g; T-133, L.6-16 reprinted at App. G, p. 8g; T-148, L.2 through T-149, L.20 reprinted at App. G, p. 11g; and T-313, L.16 through T-314, L.1 reprinted at App. G, p. 27g. Cf. T-222, L. 1 through T-223, L. 18 reprinted at App. G, p. 24g-26g as to the refusal of the court to protect Gay from a ridiculous

deposition question or to require Withers to clarify.

Petitioner was under duress and concedes his testimony caused some of the interjections of the judge. However, numerous cases already cited herein indicate that provocation does not justify a lack of impartiality or the appearance thereof by a trial judge. The judge, not Carlos G. Gay, was a man of formal education. T-133, L.17-23 reprinted at App. G, p. 9g. The trial judge apparently failed to perceive the factors that provoked discomfort and fear in the Defendant, Gay, and resulted in his over-protective testimony when adversely called by Plaintiffs as their lead witness. He knew Gay was a sole proprietor whose own personal losses were being totally excluded from consideration. T-71, L.20-25 reprinted at App. G, p. 3g. He should have known that

Defendant, Gay, had some reason to be insecure over the fact his own insurance company was simultaneously suing him before the same judge for a declaratory decree of non-coverage (in Civil Action No. 83-4-Thomasville) and that Gay was therefore being defended by counsel paid by an insurer that was seeking to deny coverage. He might even have guessed from the way Gay testified the first day of trial that Gay's counsel had not prepared him to testify as an adverse lead-off witness, resulting in further insecurity. But such consideration was apparently not given. While Gay was not entitled to sympathy or speculation, he was entitled to a fair trial. U. S. Const., amend. V. Even under "provocation," a judge should not demonstrate bias or partiality. Peckham v. United States, 210 F.2d 693, 702 (D.C. Cir. 1953).

B. The Facts Of This Case, Requiring Reversal Of An Eleventh Circuit Decision Sanctioning Unacceptable Judicial Conduct In The Trial Court Below, Make It An Appropriate Case In Which To Settle The Standards For Judicial Impartiality.

As stated in Title 28, United States Code, Section 455(a):

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

For the reasons stated above, it is respectfully submitted that the impartiality of Judge Elliott in the matter sought to be reviewed might, at least after the fact, reasonably be questioned.

> The judge should exercise self-restraint and preserve an atmosphere of impartiality. (Citation omitted). When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously

> or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored. (Citations omitted).

Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir. 1956). In order to "give assurance" that Carlos G. Gay is not deprived of his "Fifth Amendment" right to retain his property except after due process of law, certiorari should be granted and the case should be remanded to the Eleventh Circuit for reversal.

Not only this Carlos G. Gay, but all the other Carlos G. Gays in the United States, deserve a system of law that prevents "even the probability of unfairness". In re Murchison, supra, 349 U.S. 133 at 136. The American public deserves that it be guaranteed such an atmosphere in a judicial proceeding that it will have the "assurance" of "fairness and impartiality". Connelly v. United States District Court, 191 F.2d 692, 697 (9th Cir. 1951).

As demonstrated above, the facts of this case satisfy five different elements recognized by the Second Circuit Court of Appeal as being indicative of a lack of that very "assurance" to which Carlos Gay was entitled. A case such as this, viewed as "borderline" by the Eleventh Circuit Court of Appeals, needs to be remanded and reversed by this Court to re-establish the commitment of the United States Supreme Court to these principles.

CONCLUSION

Carlos Gay's family business personified the American Dream. Neither his business nor his dream should be taken from him without due process of law. For the reasons stated, Petitioner respectfully requests that a Writ of Certiorari be issued and the decision below be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

COATS & CLARK, INC.,
Plaintiff-Appellee,

v.

Carlos G. GAY, Defendant-Appellant.

WHIRLPOOL CORPORATION,
Plaintiff-Appellee,

vs.

Carlos GAY, Defendant-Appellant.

Nos. 84-8147, 84-8148.

United States Court of Appeals,
Eleventh Circuit.

March 25, 1985.

Appeals from the United States District Court Middle District of Georgia.

Before JOHNSON and CLARK, Circuit Judges, and Lynne*, District Judge.

LYNNE, District Judge.

From judgments in favor of Coats & Clark, Inc. (Coats & Clark),[1] and in favor of Whirlpool Corporation (Whirlpool)[2] for damages to their goods stores in a ware-

house operated by Carlos Gay (Gay), entered on a jury verdict in consolidated trial, Gay brings this appeal.

The issues herein are briefly synopsized as follows:

1. Whether the trial court erred in granting partial summary judgment to Coats & Clark and dismissing Gay's counterclaim;

2. Whether the trial court erroneously rejected as irrelevant proffered evidence of Coats & Clark's method of storage and caring for cotton in its Thomasville warehouse;

3. Whether the conduct of the trial judge deprived Gay of a fair trial by conveying to the jury an impression that he was antagonistic to Gay, and

4. Whether there was an absence of evidence to support the verdict in favor of each plaintiff.

Applying the pertinent standard of

review to each error assigned, and having conducted a painstaking examination of the ten volume record of a hotly contested, five day trial, we affirm.

Carlos Gay is the proprietor of General Bonded Warehouse in Thomaville, Georgia. He purchased the warehouse in 1972. On Sunday, March 14, 1982, the General Bonded Warehouse and its contents were destroyed by fire. Goods belonging to Coats & Clark and Whirlpool were damaged by the fire. The Coats & Clark property in the warehouse at the time of the fire was 2,750 bales of cotton that had a value of approximately $1,626,000. Coats & Clark salvaged cotton after the fire for a net of $8,941.80. The goods stored by Whirlpool were electrical appliances such as washers and refrigerators of the value of approximately $111,000. There was no salvage value of these goods as they were completely destroyed.

Coats & Clark delivered cotton to the warehouse and shipped cotton out of the warehouse with their own crews. Gay provided the forklift operator to bring the cotton from the storage area to the loading area of the warehouse. Coats & Clark's crews entered the warehouse to load and unload cotton and to sample cotton. They never objected to the method of stacking employed by Gay.

According to Gay, on Thursday before the fire a customer's truck struck the loading dock and a pipe that was part of the sprinkler system. The sprinkler system is a dry system in which the pipes are full of compressed air until the system is activated or unless a leak occurs, which reduces the pressure, allowing the system to flood. When Gay checked the system on Sunday morning March 14, 1982, the air pressure had fallen. He attempted to pump it up. When the air pressure seemed to be falling again,

he closed the valves to turn off the system because he was afraid that if the system had a leak in it that it would flood the goods in storage and ruin them. Gay did not post a watchman nor did he inform the fire or police department[3] that he had turned off the sprinkler system. On the evening of March 14, 1982, a fire engulfed the building.

There was no contention by either plaintiff that Gay set the fire either intentionally or negligently or that he was responsible for its being set. Plaintiffs did contend that Gay was negligent in the manner in which the cotton was stored and stacked, in his maintenance of the sprinkler system, and in turning off the sprinkler system and failing to post a watchman or alert the police department. Plaintiffs' allegation was that Gay was negligent in not controlling, diminishing, delaying or avoiding the damaged which was received in

the fire.

Separate diversity actions were brought against Gay by Coats & Clark and Whirlpool, claiming damages to their cotton and appliances stores in General Bonded Warehouse as a proximate result of Gay's negligence. Each plaintiff insisted that Gay's negligence lay in the breach of his duty to exercise the degree or ordinary and reasonable care owed by a reasonably prudent warehouseman to protect property of which it was bailee.

In each case, Gay answered with a general denial of the allegations of the complaint. In addition, Gay asserted the affirmative defense of the contributory negligence of Coats & Clark. Gay also filed a counterclaim against Coats & Clark, contending that its negligence was the proximate cause of the fire which destroyed his warehouse. The court below granted the motion for summary judgment filed in behalf

of Coats & Clark and dismissed the counterclaim. The two cases were thereafter consolidated for trial.

Throughout the trial, each plaintiff contended that Gay was negligent in turning off the sprinkler system and thereafter in failing to post a watchman and to notify the fire department that the system had been deactivated.

The jury returned a verdict against Gay in favor of Coats & Clark in the amount of $808,281.32, plus 7 percent interest, and in favor of Whirlpool in the amount of $55,513.00, plus 7 percent interest. Following the entry of judgments on the verdicts and the denial of his motions for a new trial, Gay filed timely notices of appeal.

SUMMARY JUDGMENT

In his counterclaim, Gay sought recovery of damages to his warehouse and its contents, contending that such damages were

proximately caused by the negligence of Coats & Clark. As explained in his deposition, his theory was that one or more of the bales of cotton delivered to his warehouse for Coats & Clark on or before February 18, 1982, possibly contained a latent ember, frequently referred to as a "hot bale", which smoldered until it erupted into flame on May 14.

The affidavits of Duane E. Baker, Oliver Dupree, Herbert Futch and Ed Canipelli were offered in support of the motion for summary judgment as to the counterclaim. In opposition Gay submitted the affidavit of James W. Donnelly, who identified himself as President of the Association of Consultant Engineers, Atlanta, Georgia, and as one with experience in the investigation and determination of the causes and origins of fires. It is that affidavit, and it alone, which Gay contends raises a genuine issue of material fact precluding dismissal

of his counterclaim.

(1) It is axiomatic that summary judgment is appropriate only when no genuine issues of fact are in dispute. A.M.R. Enterprises, Inc. v. United Postal Savings Association, 567 F.2d 1277, 1279 (5th Cir. 1978). In ruling upon such motions, it must be kept in mind that "[s]ummary judgment... is not only an instrument of just, speedy and inexpensive resolution, but also a lethal weapon capable of overkill." Nunez v. Superior Oil Co., 572 F.2d 1119, 1123 (5th Cir. 1978) (citations omitted). See also Brunswick v. Vineberg, 370 F.2d 605, 612 (5th Cir. 1967). Particularly where a jury trial would be pretermitted, the court should proceed with caution in assessing the probative value of the evidence:

> If decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits,

depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved.... A trial on the merits would reveal no additional data.... The judge, as trier of fact, is in a position to and ought to draw his inferences without resort to the expense of trial.... But, where a jury is called for, the litigants are entitled to have the jury draw those inferences or conclusions that are appropriate grist for juries... Juries must consider not only 'questions of fact in dispute, [but] questions of conflicting inferences from undisputed facts.' Buffalo Insurance Co. v. Spach, 5 Cir. 1960, 277 F.2d 529, 531. 'Evidentiary facts, though undisputed do not always conclusively establish the

ultimate fact at issue. When the ultimate fact is to be inferred from evidentiary facts, the choice between permissible inferences is for the trier of facts.' Walter v. U. S. Gypsum Co., 4th Cir. 1959, 270 F.2d 857, 862, cert. denied, 1960, 363 U.S. 804 (80 S.Ct. 1240, 4 L.Ed.2d 1148)... Of course, if there is a complete absence of probative facts to support a particular inference, ... or, if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at but one verdict, ... the court may bypass the jury .... Thus, whereas here, the evidentiary facts are not disputed, a court in a non-jury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions. But summary judgment is not

appropriate if the same case is to be tried to a jury, and the inferences and conclusions to be drawn are genuinely disputed. To put it in another fashion, whether disputed issues are issues of 'fact' for purposes of Rule 56 depends not only on the state of the evidence and nature of the issue but hinges also on whether the litigants have a right to a jury determination.

Nunez v. Superior Oil Co., 572 F2.d at 1123-23 (emphasis in original).

(2) With these principles as guides, we evaluate the efficacy of the Donnelly affidavit to create a genuine issue of material fact. In support of its motion, Coats & Clark submitted the affidavit of Duane E. Baker, a qualified expert, who stated, "[i]t is my opinion that the fire at General Bonded Warehouse did not occur as the result of a bale which was on fire at the time it arrived at the warehouse."

In opposition to such motion, Gay submitted the affidavit of Donnelly, who stated: "It is further my opinion that a potential cause of this fire was a smoldering bale of cotton which smoldered for a period of time"; again, "It is my opinion that a fire packed bale from the ginning process shipped into the warehouse at that time or at a time near to February 18, 1982 could have caused the fire in this warehouse"; and again, "It is my opinion that a spark from a cut band could have caused a smoldering bale which resulted in this fire."

It is obvious that Donnelly's opinion is based upon speculation and guesswork and has no significant probative value. Nowhere in his affidavit does he express an opinion that a hot bale was in fact the cause of the fire. The insufficiency of Donnelly's speculative testimony to defeat the motion for summary judgment is emphasized by comparing it with the affi-

davit of an accident reconstruction expert held sufficient in Bieghler v. Kleppe, 633 F.2d 531 (9th Cir. 1980). The court reasoned:

> The expert did more than conclude that defendant's negligence in lighting the tunnel might have caused the accident. He purported to determine that the cause of the accident was defendant's negligence. Id. at 534.

We conclude that Donnelly's affidavit raised no genuine issue of material fact and the grant of summary judgment was therefore proper.[4]

REJECTED EVIDENCE

To counter testimony adduced by plaintiff tending to show that Gay was negligent in maintaining the sprinkler system without the advice and assistance of professionals in stocking the bales, and in providing access or inventory aisles only two feet in width, Gay offered to prove by witnesses

Futch, Dupree and King that similar habits, customs and methods were employed by Coats & Clark in the operation of its Thomasville warehouse for cotton storage. Rejection of this offer is assigned as error.

(3) Gay proceeds from the premise that evidence of custom within a particular industry is admissible as bearing on the standard of care in determining negligence. Muncie Aviation Corporation v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975); accord B & B Insulation Co. v. Occupational Safety & Health Review Commission, 583 F.2d 1364 (5th Cir. 1978). We agree but conclude that the evidence relied upon by Gay utterly fails to bring this case within the ambit of that principle.

(4) While Gay offered to prove that Coats & Clark was the largest manufacturer of cotton thread in the world, there was no offer of proof that it was a significant warehouser of baled cotton. Nor was there

any offer of proof as to the practices of other warehousers. Rather, Gay was content to proffer evidence concerning a single Coats & Clark warehouse at Thomasville, Georgia. Clearly, the methods employed by a single warehouser at a single location are not sufficiently probative of the custom of the warehouse industry generally. Such evidence was irrelevant to the issue of the duty of ordinary and reasonable care owed by Gay. It was properly rejected by the trial judge who may have considered it a subtle but misguided effort to import into a case at law the equitable doctrine of "unclean hands."[5]

CONDUCT OF THE JUDGE

(5) The most troublesome issue in this appeal arises from Gay's complaint that the trial court, from the outset and throughout the trial, exhibited toward the defendant, his counsel, and his case an attitude of impatience and antagonism

that established and set the mood for the trial and unduly burdened his right to a fair trial. In his brief Gay lists twenty-one incidents which he contends conveyed to the jury the impression that the judge was being partisan. No contemporaneous objection was registered to the remarks of the judge which he now insists were prejudical. However, the lack of timely objection will not preclude review:

> Where a trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial, the absence of objections will not preclude our review since counsel will be loathe to challenge the propriety of a trial judge's utterances for fear of antagonizing him and thereby prejudicing a client's case. Miley v. Delta Marine Drilling Co., 473 F.2d 856, 857-58 (5th Cir.), cert. denied, 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d

89 (1973). Although not precluded, appellate review is limited to review for plain error. E.g., Morreale v. Downing, 630 F.2d 286 (5th Cir. 1980). Newman v. A.E. Staley Mfg. Co., 648 F.2d 330, 335 (5th Cir. 1981). Thus, we must decide whether the conduct of the trial judge was so partial and prejudicial as to constitute plain error.

A federal judge is not a "mere moderator of proceedings." Moore v. United States, 598 F.2d 439 (5th Cir. 1979). Rather, he possessed broad powers to "comment on the evidence, ... question witnesses [in order to] elicit facts not yet adduced or clarify those previously presented, ... and [to] maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion." Id. The court below did all of thest things. This alone does not establish deprivation of a fair trial, however, "Only when the judge's conduct

strays from neutrality is the defendant thereby deprived of a fair trial." Id.

One of the most demanding tasks of a trial judge is to keep a trial within proper bounds and to move it along as expeditiously as the ends of justice will permit, without taking frequent recesses to admonish witnesses or counsel in the absence of the jury. Firm but impartial hands are required. He must keep uppermost in his mind that "[t]he influence of the trial judge on the jury 'is necessarily and properly of great weight' and his 'lightest word or intimation is received with deference, and may prove controlling'." Quercia v. United States, 289 U.S. 466, 470, 53 S.Ct. 698, 699, 77 L.Ed. 1321 (1933).

We have considered the record as a whole, including the judge's charge to the jury, rather than focusing narrowly on instances of allegedly improper conduct referred to in briefs of counsel. Newman v.

A. E. Staley Mfg. Co., 648 F.2d 330, 345 (5th Cir. Unit B 1981). We note at the outset that the testimony of Gay, called as plaintiffs' first witness for the purpose of cross-examination, extended through 184 pages of the transcript and that his testimony alone accounted for 360 of the 1120 pages of the trial testimony. We recognize how crucial his testimony and his credibili- were to the defense. The judge's interjections were not directly denigrating as to either. Many of them did occur while Gay was on the stand or his counsel was eliciting testimony, but they were largely justified. The context in which the judge's remarks were made makes it clear that Gay displayed a pattern of evasiveness while on the stand, which mandated firm intervention by the court. Understandably, the judge's remarks grew somewhat harsher as Gay persisted in his habit of evading questions or responding to simple questions

with extended remarks tailored to his self-interest.

(6) We do not condone the sarcasm, the open expressions of impatience, and the intemperate and facetious remarks which occassionally appear in the record. However, after a careful review of a cold, lifeless record, we are left with the impression that the trial judge's impatience was justified. We are not convinced that the jurors may have perceived the trial judge as partial towards the plaintiff and biased against the defendant. Although the trial judge stepped close to the line of neutrality in this case, we conclude that he did not step over it. There was no plain error requiring a reversal.

EVIDENCE TO SUPPORT THE VERDICT

(7) Finally, Gay argues unpersuasively that there was a total absence of evidence to support the damage award to either plaintiff. He concedes, as he must, that because

there was no motion for directed verdict or for judgment notwithstanding the verdict in the court below, our review is limited to a determination of whether there is any evidence in the record which supports the verdict. Powell v. Merrimark Mutual Fire Ins. Co., 667 F.2d 26 (11th Cir. 1982).

(8) The jury returned a verdict in favor of Coats & Clark in the amount of $803,281.32, plus 7 percent interest. The record evidence clearly supports this award. Coats & Clark adduced uncontroverted evidence that the total damage to its cotton, after taking into account its net salvage value, was between $1,599,835.53 and $1,659,710.71. Donnelly, Gay's own expert, testified that from 50 percent to 60 percent of the damage to the cotton might have been avoided if the sprinkler system had not been turned off. His opinion easily provides evidentiary support for the award of damages to Coats & Clark in approximately 50 percent

of the total amount of damages to its cotton.

The jury also returned a verdict in favor of Whirlpool in the amount of $55,513.00, plus 7 percent interest. Again there was evidence to support this award. Whirlpool's evidence established that the total value of its appliances destroyed by the fire was $111,039.00 and there was no salvage value. Gay insists, however, that the only evidence relevant to the issue of damage to the appliances caused by his negligence was the testimony of Donnelly to the effect that no such casual connection existed.

(9, 10) Essentially, he argues that the appliances were primarily damaged by water and that even if the sprinkler system had been operating properly the appliances would have been damaged to the same extent. He has support for this argument in Donnelly's testimony. However, there was evidence

of other negligence on the party of Gay which the jury was entitled to consider. For instance, if he had posted a watchman, the fire might have been discovered at a stage early enough to avoid some of the damage to both appliances and cotton. In any event, since he did not raise the suf-fiency-of-the-evidence issue in the court below, his argument will not pass muster under the "any evidence" standard. This is particularly true in light of the rule under applicable Georgia law that recovery for undisputed damage cannot be denied sim-ply because it is difficult or impossible to determine the precise amount of damage caused by defendant's conduct. See Molly Pitcher Canning Co. v. Cent. of Ga. Ry. Co., 149, Ga. App. 5, 253 S.E. 2d 392 (1979); Atlanta Tallow Co. v. John W. Eshelman & Sons, Inc., 110 Ga. App. 737, 140 S.E. 2d 118(1964).

The judgments of the District Court are AFFIRMED.

FOOTNOTES

*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

1. Insurance Company of Pennsylvania, the insurer-subrogee of Coats & Clark, was added as a party plaintiff in 84-8147.

2. Arkwright-Boston Manufacturers Mutual Insurance Company, the insurer-subrogee of Whirlpool, was added as a party plaintiff in 84-8148.

3. Gay testified that he left a note attached to the sprinkler room door with scotch tape to advise Hatcher, his manager, and the fire department, that the system had been turned off. Of course, this note left within a locked warehouse falls far short of notice to the fire department.

4. As it turned out, Gay lost nothing as the result of the dismissal of his counterclaim but the tactical advangage of focusing the attention of the jury on the extent of his own pecuniary loss. As a witness for the defendant at trial, Donnelly's testimony extended over 143 pages of the transcript; a aubstantial portion was addressed to the alleged contributory negligance of Coats & Clark. While it was consistent with statements in his affidavit submitted in opposition to the motion for summary judgment, its effect was graphically summarized by his statement. "[m]y primary job was discovering the cause and origin of the fire" (TR. 1152),

followed immediately by:

> "Q. You never determined the cause, did you, sir?
>
> A. No, sir, I did not...." (TR 1551)

In submitting the issue of contributory negligence to the jury, the trial court's instruction on the application of the Georgia Comparative Negligence Rule was a model of clarity. The following extracts from the charge are sufficient to make our point:

> I charge you that if you should find that the plaintiff Coats and Clark was negligent and that its own negligence was the sole proximate cause of the damage to its product, then, of course Coats & Clark couldn't recover anything from Mr. Gay because you would've determined that Mr. Gay wasn't at fault at all in the circumstances. If you determine that Coats & Clark was negligent and that its negligence was a contributing proximate cause to the damages sustained but that Mr. Gay was also negligent and that his negligence was a contributing proximate cause to damages sustained, but that Coats and Clark was more negligent than Mr. Gay, then Coats and Clark could not recover anything from Mr. Gay because you would've decided that they were more at fault than he was.
>
> Next, if you determine that Coats and Clark was negligent and its negligence was a proximate cause of the damages sustained, and if you conclude that Mr. Gay was also negligent and his negligence was a contributing proximate cause of the damages, and you conclude that they both were equally negligent, fifty-fifty, one just as negligent as the other, then Coats and Clark could not recover

anything from the defendant because you would've concluded that they were equally at fault.

Inasmuch as the jury returned a verdict in favor of Coats & Clark in approximately 50 percent of value of its cotton, less salvage, Donnelly's estimate of the total loss resulting from the inoperative sprinkler system, it follows ineluctably that they found that Costs and Clark was guilty of no negligence. Thus the submission was of Gay's counterclaim to the jury would have been an exercise in futility.

5. To have allowed Gay to introduce such evidence would have opened the door for a patently frivolous but potentially effective argument to the jury that Coats & Clark was seeking to collect damages from Gay for doing precisely what it has been doing habitually.

APPENDIX B

T-1412, L. 4-12

In the case of Coats and Clark, Incorporated versus Carlos G. Gay, Civil Action 82-34-Thomasville Division, the verdict of the jury is "we the jury find for the plaintiffs and against the defendant in the amount of $803,281.32 plus seven percent interest." In other words fifty percent of the amount sued for plus seven percent interest, is that what the jury intended, Mr. Foreman?

THE FOREMAN: Yes, Your Honor.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

COATS & CLARK, INC., and
THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA,

Plaintiffs,

v.

CARLOS G. GAY,

Defendant.

CIVIL ACTION FILE NO. 82-34-THOM

JUDGMENT

This action came on for trial before the court and a jury, Honorable J. Robert Elliott, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is ORDERED AND ADJUDGED that the plaintiffs recover of the defendant, Carlos G. Gay, the sum of $900,486.39, with interest thereon at the rate of 9.86

percent as provided by law, and their costs of action.

Dated at VALDOSTA, GA., this 14th day of December, 1983.

GIRARD W. HAWKINS
Clerk of the Court

s/ J. Lundie Smith

BY: J. LUNDIE SMITH
DEPUTY U.S. CLERK

Filed at 1:00 P.M.

December 14, 1983

s/J. Lundy Smith

Deputy Clerk, U.S. District Court

APPENDIX D

T-1413, L. 3-11

THE COURT: -- "Phillip I. Ward, Foreman."

And in the other case, the case of Whirlpool Corporation and others versus Carlos G. Gay, defendant, Civil Action 83-35-Thomasville Division, verdict, "we the jury find for the plaintiffs and against the defendant in the amount of $55,513.00 plus seven percent interest, in parenthesis fifty percent plus seven percent interest, parenthesis closed, this the 5th day of December, 1983. Philip I. Ward, Foreman."

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

THOMASVILLE DIVISION

WHIRLPOOL CORPORATION, et al.

Plaintiffs,

vs.

CARLOS G. GAY,

Defendant.

CA-83-35-THOM

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable J. Robert Elliott, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED

That the plaintiffs Whirlpool Corporation and Arkwright-Boston Manufacturers Mutual Insurance Company recover of the

defendant Carlos G. Gay the sum of Sixty-Two Thousand Four Hundred and Thirteen Dollars and One Cent ($62,413.01), with interest thereon from this date at the rate of 9.93 percent as provided by law, and their costs of action.

Dated at Thomasville, Georgia, this 5th day of December, 1983.

GIRARD W. HAWKINS
Clerk of Court

s/ J. Lundie Smith

By: J. Lundie Smith
Deputy U.S. Clerk

Filed at 1:00 P.M.

December 14, 1983

s/ J. Lundy Smith

Deputy Clerk, U.S. District Court

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8147

COATS & CLARK, INC.

Plaintiff-Appellee,

versus

CARLOS G. GAY,

Defendant-Appellant.

No. 84-8148

WHIRLPOOL CORPORATION,

Plaintiff-Appellee,

versus

CARLOS G. GAY,

Defendant-Appellant.

- -

Appeal from the United States District Court for the Middle District of Georgia

- -

ON PETITION FOR REHEARING

(May 13, 1985)

Before JOHNSON and CLARK, Circuit Judges, and *LYNNE, Senior Judge

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

s/ Frank M. Johnson, Jr.
United States Circuit Judge

*U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX G

T-19, L. 17-24

And there is another insurance company that's interested one way or another in the outcome of this case from the standpoint of the defendant, Mr. Gay, and that is the Hanover Insurance Company, the Hanover Insurance Company. Is any member of the jury panel an officer of or an agent for or employee of or a stockholder in the Hanover Insurance Company? If so, will you stand and tell us about it at this time?

T-23, L. 23 through T-24, L. 9

All right, Now, I am informed that Mr. Gay not only owned and operated this warehouse but that he also owns and operates another business here in Thomas County. And what I want to know is whether any member of the jury panel is employed at any of these other businesses that are owned and operated by Mr. Gay or whether any member of your immediate family is employed by Mr. Gay in any of these other businesses. For instance, I am told that he operates a business known as the Superior Supply Company and the Downtown Motor Inn and the General Bonded Warehouse and Faromes, F-a-r-o-m-e-s, which is retail light and appliance store, and the Auto Service Center.

T-71, L. 20-25

THE COURT: Now, your Motion in Limine went a little further, Ms. Roberson. I don't see any reason why the jury should be informed about any losses Mr. Gay himself may have had in the fire. That has nothing to do with whether the plaintiffs are entitled to recover in these cases or not. So your Motion in Limine, of course, I'm sustaining it ....

T-72, L. 4-18

MS. ROBERSON, Yes, Your Honor. The Plaintiff Whirlpool also had a Motion in Limine, a motion to exclude evidence relating to --

THE COURT: Other warehouses?

MS. ROBERSON: --other warehouses of the plaintiff.

THE COURT: I don't see any reason why the jury should hear anything about that, what the agreement was between Whirlpool and some other warehouse, some other location. I don't see any reason why they should know anything about that.

Same is true of Coats and Clark. This is this warehouse, what the agreement was with this warehouse, we're concerned with. I would not be inlined to hear anything about those others.

T-130, L. 19-25

MR. WITHERS: I ask the reporter to read my question back.

THE COURT: That wasn't the question he asked you, Mr. Gay. I don't know what you thought you were responding to, but that wasn't the question which he asked.

MR. WITHERS: Your Honor, I move to strike that response.

T-131, L. 7 through T-132, L. 10

THE COURT: He's not required to explain anything to you, Mr. Gay. He's just there to ask questions.

THE WITNESS: I'm trying to answer his question, but I want to know what he's asking.

BY MR. WITHERS:

Q. Mr. Gay, perhaps if I restate my question it'll be helpful to you.

At the time of the fire we're concerned with on March 14, 1982 there was no bond on General Bonded Warehouse, was there?

A. Judge, I don't know how to answer him because --

THE COURT: You were running the warehouse.

THE WITNESS: When I bought the warehouse --

THE COURT: Don't you know what a bonded warehouse is?

THE WITNESS: Whenever I bought the warehouse it was called Holland Bonded Warehouse, and I asked Truman Holland where the "bonded" came from. And he told me that he had $10,000 worth of insurance on --

THE COURT: Well, let me just ask you a question. Don't you know what a bonded warehouse is? You're a warehouser. Don't you know what a bonded warehouse\is?

THE WITNESS: I don't know what his concept of it is.

THE COURT: Well, what is your conception of a bonded warehouse?

THE WITNESS: Where if you put merchandise into a warehouse and if you damage it or you lose it, then you have to replace it.

T-133, L. 6-16

Q Prior to this fire that we're concerned with in this case, you never read any books or pamphlets or anything that would teach you how to be a warehouseman, had you?

A We had -- you have trade magazines that have articles in there by many people that are in the business that will tell you how certain warehouses are operated. You've got diagrams, you've got cuts, you've got pictures.

MR. WITHERS: Your Honor, I move to strike. He's unresponsive to the questions.

THE COURT: Yes, that wasn't responsive to the question. Repeat your question.

T-133, L. 17-23

BY MR. WITHERS:

Q Mr. Gay, prior to this fire you had never seen or read any books or pamphlets which would teach you how to be a warehouseman, had you?

A I hadn't gone to a formal school. I had read some books if you want to -- depends on what you want to call a book.

T-137, L. 11-25

Q You're familiar with the fact that there is something called the Georgia State Warehouse Act, are you not?

A Yes.

Q And other than the Georgia State Warehouse Act, at the time of this fire --

MR. ECKL: Your Honor, the Court has ruled the Georgia State Warehouse Act out of evidence in this case.

THE COURT: He just asked him whether he's familiar with it.

MR. ECKL: Your Honor, but the implication is it has something to do with this case.

THE COURT: He's just trying to find out what he knows about warehousing. I think that's what he's trying to find out.

Go ahead.

T-148, L. 2 through T-149, L. 20

Q And the object of that cotton being delivered there was so that it could be stored there until Coats and Clark needed it, wasn't it?

A Coats and Clark rented space from us and they stored the cotton in that space, yes.

MR. WITHERS: I move to strike that answer, Your Honor. It's unresponsive, and I ask him to answer the question.

THE COURT: You'll just answer the questions he asks you, Mr. Gay. It'll help us along.

THE WITNESS: Yes, sir, they rented space and stored the cotton --

THE COURT: That wasn't the question he asked you. Just answer the question.

THE WITNESS: Repeat the ques-

tion.

BY MR. WITHERS:

Q The object of Coats and Clark having that cotton delivered to General Bonded Warehouse is so that it could be stored there until some later time, was it not?

A By them, yes.

Q. So by Coats and Clark paying you this 14¢ per hundred pounds per month, you agreed to store the cotton for them, right?

A We agreed to rent them that space based on 14¢ a pound. A pound of cotton would take so much cubic feet of space or inches --

MR. WITHERS: Your Honor, I'd move to strike that.

THE COURT: Yes, disregard that answer, members of the jury because that wasn't in response to the question.

THE WITNESS: Repeat it.

THE COURT: Well, why should we

have to repeat it every time? Why don't you just answer the question that's propounded to you to begin with. Then we won't have to repeat, and we may get through with this case sometime this month.

All right, repeat your question again.

BY MR. WITHERS:

Q Mr. Gay, so Coats and Clark got its cotton stored and General Bonded Warehouse received 14¢ per month per hundred pounds of cotton stored, is that correct?

THE COURT: All you've got to do is just say yes if that's correct. If it isn't correct, say no it's not correct. You don't have to make a speech about it. Just answer the question.

T-151, L. 5-7

GAY: I believe it is. I cannot sit here and swear because I don't see anything that I recognize such as a signature or anything.

T-153, L. 17-19

Q Now, where was the space -- where was the phone company's goods located?
A I can tell you where I believe they were.

T-155, L. 7-9

A The cotton was in this area here. I believe to my knowledge Mr. Hatcher has drew it in approximately as it should be.

T-166, L. 15-19

A I gave you an outline of basically where it normally would be and what I believed, not what I knew. I might say this to the jury: If I believe something, I'll tell you I believe it. If I know it, I'll tell you I know it. So if I say believe, you understand I'm not sure.

T-193, L. 10-12

A I believe that's correct. The warehouse had a contract whenever I bought it, and I believe that was the firm.

T-803, L. 2-7

A I believe it to be. I haven't taken and gone down there and measured it. If it was 14 feet between them, you can stack two bales of cotton --

Q I'm just trying to confirm what your testimony has been.

A I told you what I believe.

T-162, L. 6-13

Q And the purpose for that again was the security -- or stability would probably be a better word than security -- the stability of that stack of cotton, wasn't it?

A The purpose of it was to keep the cotton from rolling or falling.

THE COURT: That's what you meant by stability, isn't it?

MR. WITHERS: That is correct, Your Honor, I did.

T-167, L. 18-20

Q At the time of your deposition I believe you told me that those aisles were three feet to three and a half feet wide, is that correct?

T-188, L. 21-23

Mr. Gay, am I correct that you believe that the sprinkler system that was in the General Bonded Warehouse at the time of the fire was a unified system...?

T-189, L. 8-11

Q Mr. Gay, am I correct you believe that at the time of the fire the dry sprinkler system at the General Bonded Warehouse was a unified system, which was interconnected and covered the entire warehouse?

T-190, L. 6-9

Q And am I correct that you believe that any leak at any place in the dry system that you had at General Bonded Warehouse at the time of the fire, that you believe any leak would've caused the entire system to fill with water?

T-193, L. 13-15

Q And it was your belief that you could upgrade the sprinkler system maintenance by handling it yourself, didn't you.

A They cut the steel band or wire that's on the bale to take the sample.

Q And you saw people do that intentionally?

A It was a standard procedure. They did 10 out of every 100 or 25 of every 100, whichever one they were instructed to do, so I'm told. I saw them cut the band --

MR. WITHERS: I move to strike that, Your Honor. It's something this man doesn't know. He said "so I'm told."

THE WITNESS: About the numbers. I saw them cut the bands now. I know that; I saw that.

THE COURT: I don't know what he's saying. I don't know whether he's saying that they cut the bands every bale or every ten bales. I don't know what he's saying about it.

T-182, L. 4 through T-183, L. 19

And my answer is "Uh-huh" or my question. And then you go on and talk about "because they quit that, bringing their people in to load it out."

Doesn't have anything to do with changing that agreement, does it?

MR. ECKL: Your Honor, it does indeed, and counsel is characterizing it rather than reading it. And that's not fair; he can't do that.

THE COURT: Has he read everything --

MR. ECKL: No, sir, he has not read everything. He asked him whether or not there were changes, and Mr. Cay tells him what those changes were. He continues actually on that page and over onto the next page.

MR. WITHERS: Your Honor, the question was was there any change in this

written agreement. That's how we got started with the whole thing. And on Page 63 at Line 3 it says, "So far as the agreement, it had never been changed."

MR. ECKL: Your Honor, I wish the Court would look at it.

THE COURT: I'm not going to look at it. If y'all can't agree on it, he can just stop where he is. Then when you put up your side, you can bring out whatever you want to bring out about it. I'm not going to referee it.

MR. ECKL: I would like to say for the record, Your Honor, I object to him only reading part of his answer. And that's exactly what he's done. In fact, he continues. Counsel says u-m-h-m-m, and then Mr. Gay continues with what he had. He hasn't read the whole answer. See, that's my problem.

MR. WITHERS: I'll go ahead and I'll read from my um-humm. You go on,

"But they quit that and started bringing their people in to load it, and they didn't let us touch it." And then he goes on, Your Honor, with something that is unrelated to anything and certainly not responsive to what's going on.

MR. ECKL: It is indeed, Your Honor. He explains why they quit issuing the instrument and what the changes were. I can't imagine this.

THE COURT: When you put your side of the case up --

T-222, L. 1 through T-223, L. 18

Q Mr. Gay, take your deposition, if you will, and see if you can find anywhere in there that you told me anything about your knowing about priming that valve. Take your time.

A. Well, now, you just told me we were talking about priming fluid. Now you're saying I don't know anything about priming.

Q Take your time. If you find anything about --

A Which question you want me to answer, priming a valve or priming fluid?

Q See if you can find anything in there where you told me you knew to prime that valve at the time of your deposition.

A Again that day, Mr. Withers, I was explaining the valve to you and doing it as short as possible. I don't know whether you remember it or not, but y'all

wanted to get back to Atlanta.

Q What page is that on that we're reading from?

A That's 126.

Q How big of a hurry was I to get back to Atlanta when I finished up -- what page was I on when I finished up? Look at the deposition.

A Y'all gave me a 20-minute lunch break, because you wanted to catch a plane.

MR. WITHERS: I move to strike that as unresponsive, Your Honor, and ask that he answer the question.

THE COURT: Disregard the 20-minute lunch break, members of the jury. Disregard wanting to get back to Atlanta on the plane. Disregard the whole answer. Just disregard the whole answer because it's not responsive to the question.

The question was, to be answered is,

look at the whole deposition and s e if you can tell him anywhere in there where you told him that you knew that you had to prime what? What --

MR. WITHERS: Prime anything.

THE WITNESS: The valve --

THE COURT: Now, this is a hundred and how many pages?

MR. WITHERS: Maybe I can shortcut it, Your Honor.

THE COURT: I just didn't want to sit here while you're looking through --

MR. WITHERS: I understand.

T-313, L. 16 through T-314, L. 1

Q And you understood that one of the purposes of having a sprinkler system was to protect the goods and the warehouse itself from fire damage?

A That was my understanding, but again I'd like to qualify it. Mr. Prussing (of Whirlpool) didn't bring that subject up --

MS. ROBERSON: Your Honor, I'd ask that the latter part of the witness' comment be stricken, that the witness be instructed strictly to respond to the question.

THE COURT: Well, I've done that so many times now I think maybe I better have a record made and just play it. But go ahead; go ahead.

T-406, L. 6-11

MR. WITHERS: Mr. Peterson, please don't tell the Court any of his questions are simple.

(Laughter)

THE COURT: I noticed he said that was simple.

MR. WITHERS: Fascinating is a better word.

(Laughter)

T-404, L. 17-20

THE COURT: I want to ask him something there that really doesn't have anything to do with the trial of the case, but I'm just curious about it.

T-610, L. 9-18

THE COURT: Are we still going to proceed as we previously understood?

MR. ECKL (Gay's counsel): Yes, sir.

THE COURT: Now, members of the jury, the plaintiffs have not quite presented all the evidence that they want to present. But because of difficulties about a witness not being available right at this minute, the defendants are going to go ahead and start presenting the defendant's evidence. But the plaintiff is still going to introduce a little more evidence after lunch today.

Q On this particular instance when you put the valve back on, did you use priming water?

A You would put priming water in, yes.

Q So then when you close the system --

A When -- you'd have to do -- if you put --

THE COURT: No, just a minute. You keep on saying well, you would do this, so on. We want to know what he did, not what somebody else would do.

BY MR. McKINLEY:

Q When you did it in June of 1981 --

A I was telling what I did --

T-758, L. 23-24

Q You put this back on and you --

THE COURT: Don't lead him.

Don't lead him.

T-759, L. 15-25

A Then after that if everything is A-okay, you pump it up so whatever pressure has been determined by the water supply pressure, which is either from -- in our case it was from the city --

Q When you're referring to you pumped, you're referring to what you did?

A Myself, yes.

THE COURT: You led him into saying that.

MR McKINLEY: Excuse me, Your Honor.

THE COURT: Have we got it back operational?

(Laughter)

T-828, L. 6-12

Q What is your general understanding as to how that operates?

MR. WITHERS: Your Honor, we'll stipulate to how the system operates.

THE COURT: Do we need to go through all that again? I think if we go through it one more time I'm going to get confused.

T-1115, L. 14 through T-1116, L. 9

Q It's an inference you drew from those facts?

A I don't quite follow that inference --

THE COURT: What would you call it?

THE WITNESS: I would call it, based on engineering principles it had to break back there.

THE COURT: Are you saying now that you know the pipe did break back there? Are you saying that you know that the pipe broke back there?

THE WITNESS: Based on what Mr. Gay has testified as to the air leaking, it's most probable that air would be leaking back at that pipe due to a crack.

THE COURT: Most probable. But what he's asking you aren't you drawing the inference from those facts, and you said no. Well, what I want to know and

what he wants to know is if it's not an inference, what is it. We just want to know what you're saying.

THE WITNESS: Well, I guess I don't understand what an inference -- inference to me seems to imply I'm guessing. Instead I'm really trying to apply engineering principles and tell you that, yes, it would crack back there, not in the middle of the pipe.

BY MR. WITHERS:

Q Mr. Donnelly, who hired you in this matter?

A A Mr. Harold Brown.

Q Where does he work?

MR. ECKL: Your Honor, may I approach the bench?

THE COURT: Well, you questioned the expert witnesses put on the stand by the other side about who employed them, even about how much they were paid an hour and so on. He would have the same right.

(inaudible conversation)

THE COURT: Well, let's see. Take the jury to the jury room, Mr. Marshal.

T-1132, L. 14-23

Q And then you picked up a certification or license -- are you licensed as an electrical engineer?

A Yes. For the last 20 years, due to my --

THE COURT: Well, the answer is yes.

THE WITNESS: Yes, the answer is I'm licensed in five states as a registered professional electrical engineer. I took the elecrical engineering exam.

THE COURT: So the answer is yes.

THE WITNESS: Yes.

THE COURT: What's your next question?

T-1184, L. 19-23

THE COURT: Well, I noticed the man sitting back there part of the day yesterday. And when I saw him sitting back there, I wondered if he was -- who he was. When he comes in the Courtroom If I recognize him as being that same man, of course, I'll sustain your objections.

T-1186, L. 1-6 and L. 13-16

THE COURT: Well, the rule is that all witnesses were supposed to stay out of the Courtroom. I'm not going to say I'm not going to let him testify. I note in your objection, Ms. Roberson, that if I let him testify and the case comes out contrary to the way you want it to come out, of course, you'll have basis for a motion for a new trial.

THE COURT: Well, I'll probably let him testify but you've got a good basis there probably for a motion for new trial if it doesn't turn out the way you want it to.

T-1199, L. 21 through T-1200, L. 15

MR. McKINLEY: Defendant calls Earl Adams.

(Pause)

MR. McKINLEY: Your Honor, I'm informed Mr. Adams is scheduled to arrive here at 9:30, in eight minutes. I apologize he's not here at this minute.

THE COURT: Well, we're not going to wait on him. We're not going to wait on him. We don't wait on witnesses.

What else do you have?

MR. McKINLEY: Mr. Gay, would you please take the stand?

MS. ROBERSON: Your Honor, again I'd like to state an objection to the defendant recalling a witness that they've had thorough opportunity --

THE COURT: I'm going to be alert that -- if it appears to me that they shouldn't be putting him back up,

I'll stop it.

MR. McKINLEY: Please take the stand.

MS. ROBERSON: Your Honor, again I'd like to state an objection to the defendant recalling a witness that they've had thorough opportunity --

THE COURT: I'm going to be alert that -- if it appears to me that they shouldn't be putting him back up, I'll stop it.

MR. McKINLEY: Please take the stand.

THE COURT: There's not going to be any repetition, I guarantee that.

T-1201, L. 1-5

MR. WITHERS: I object to the comment that it's cheaper --

THE COURT: I sustain the objection. The question was were things like this at the warehouse. Now, what's the answer to that?

T-1202, L. 9 through T-1203, L. 1

THE WITNESS: And I believe --

THE COURT: And you can't testify about what you believe. You can testify about facts. This man hasn't been qualified as an expert on --

THE WITNESS: Still --

THE COURT: Just a minute, just a minute.

THE WITNESS: All right, sir.

THE COURT: He hasn't been qualified as an expert in this business.

BY MR. McKINLEY:

Q Mr. Gay, just tell us what that is.

A This band was also found on the fire site.

Q What was that used for in the warehouse at the time of the fire or prior to the fire?

A It had cotton on it. So based on that we believed it was used on some of the

cotton.

MS. ROBERSON: Objection to the witness testifying to what he believed, not what he knows.

T-1203, L. 17 through T-1204, L. 20

Q Mr. Gay, on this particular item, explain this as a baling wire or for cotton. And you mentioned you found cotton on these wires. Would you describe that? Is that shown on that?

A Here's the cotton right here. Also there's some right here.

Q Now, if you would also, please, would you describe what exactly this is and how that is used?

A This is the buckle --

MS. ROBERSON: Your Honor, I object to this line of testimony as irrelevant to any issue --

THE COURT: I don't see any relevance -- what are you doing, filibustering until your other witness gets here? Is that what you're doing? I noticed you were just looking at your watch.

MR. MCKINLEY: You asked me --

THE COURT: You're using this witness to filibuster until your other witness gets here? Is that what you're doing?

MR. McKINLEY: Your Honor --

THE COURT: You may go down. You may go down, Mr. Gay. You may step down.

MR. McKINLEY; Could I have these marked, please, or at least this one?

THE COURT: That's taking a little time, too, isn't it, for the clerk to mark those things?

By the way, I think I just saw your witness appear out there. So you don't have to filibuster any longer. I think he's out there.

T-1213, L. 14-16

THE COURT: Do we need to know all about that? This is not a nuclear plant here we're talking about. Ask him what you want to ask him about this case. Go on.

T-1238, L. 7-20

Q What's the purpose of the "U" hook then for that type of support?

THE COURT: Mr. McKinley, this is just repetition of what other witnesses have testified about --

MR. McKINLEY: Your Honor, I'll be brief, and Mr. Davis did raise questions about the ruggedness of the system. And I merely want to ask him about the support and the effects on that pipe. And I'll be brief.

THE COURT: He never saw it, never saw it. He's just repeating what other witnesses have said about those "U" hooks and all that business. Can't we just cut it short? This ten-minute witness has already taken 40 minutes. This was a ten-minute witness, by the way. It's already taken 40.

T-1258, L. 8-21

THE COURT: I know there's been a lot of talk about it. I've told you gentlemen all through the thing that I thought you were spinning your wheels.

MR. ECKL (Gay's counsel): Your Honor, that's their case as laid, and indeed in P-1 and in the evidence, the evidence is clear that they did not warn Mr. Gay of the special hazards of fire of which they were aware, of which he would not be aware, and that has to do with whether or not the sprinkler system was turned off. Tremendously relevant with reference to that. If you want a special hazard, you ought to communicate that. And neither P-1 nor in any evidence did Costs and Clark ever require Mr. Gay to have that sprinkler on all the time or even, Your Honor, to have a sprinkler.

Now, I said one case is the case of Coats and Clark against Mr. Gay and the other case is Whirlpool against Mr. Gay. Well, actually technically -- I didn't have the names here before me -- actually another party to the case of Coats and Clark is the Insurance Company of the State of Pennsylvania, and actually technically another party to the case, the Whirlpool part of the case, is Arkwright-Boston Manufacturers' Mutual Insurance Company. That insurance company is also technically a party to that case. Whenever I say the Whirlpool case, I'm talking about that case. And whenever I say Coats and Clark case, I'm talking about that case. I'm not going to go through all that rigmarole everytime.

T-1372, L. 7-13

... It is the failure to use ordinary care under the circumstances in the management of one's property or person. And ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to other people.

APPENDIX H

Brief of Appellee, Coats and Clark
Before Eleventh Circuit
(Excerpt, Page 32)

It apparently had become obvious to the trial court that defense counsel recalled Carlos Gay for the purpose of delaying the trial until the tardy expert witness arrived. Plaintiffs' counsel states in its place that defense counsel sought an agreement from plaintiffs' counsel to delay the trial between the time witness James Donnelly stepped down and the time when Carlos Gay was recalled to the stand. Plaintiffs' counsel agreed to a recess, but the court did not agree.

Supreme Court, U.S.
FILED
SEP 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARLOS G. GAY

Petitioner,

v.

COATS & CLARK, INC.
and
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
and
WHIRLPOOL CORPORATION
and
ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY

Respondents.

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

37 pp

QUESTION PRESENTED FOR REVIEW

Whether certiorari should be denied by the United States Supreme Court because Petitioner has failed to establish special and important reasons warranting the exercise of this Court's discretion.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this Petition for Writ of Certiorari are set forth in the caption of the petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-275

CARLOS G. GAY

Petitioner,

v.

COATS & CLARK, INC.
and
THE INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA
and
WHIRLPOOL CORPORATION
and
ARKWRIGHT-BOSTON MANUFACTURERS
MUTUAL INSURANCE COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The March 25, 1985, opinion of the Eleventh Circuit Court of Appeals, is reported at 755 F.2d 1506. The order denying petition for rehearing and the judgment of the United States District Court for the Middle District of Georgia, entered December 14, 1983, are unreported, but may be found in the appendixes to the Petition for Writ of Certiorari, appendix F and C, respectively.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions, each of which, in pertinent part, is set forth below:

U.S. Const. amend. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Title 28, United States Code
Section 1254(1)

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> 1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree;

Title 28, United States Code,
Section 455(a)

> Any justice, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

United States Supreme Court Rule
17.1(a)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

Respondents believe that the Statement of the Case as set forth in the Petition for Writ of Certiorari is adequately presented.

ARGUMENT

DENIAL OF CERTIORARI IS APPROPRIATE BECAUSE PETITIONER HAS NOT SHOWN GOOD CAUSE WARRANTING THE EXERCISE OF JUDICIAL DISCRETION BY THE UNITED STATES SUPREME COURT.

The Petitioner has not shown to the Supreme Court that the present litigation involves "special and important" issues which would justify the granting of certiorari. Because the issuance of a Writ of Certiorari is discretionary, Petitioner carries the heavy burden of establishing that his case presents special and important reasons why the petition should be granted. The Writ of Certiorari should be granted only in cases of importance to the *public,* as distinguished from that of the *parties,* and where there is a real and embarrassing conflict between the Circuit Courts of Appeal. *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 393 (1923). Petitioner attempts to meet this burden by contending that (1) "the opinion of the 11th Circuit below conflicts with prior opinions of [the Supreme] Court, . . . and of other circuits . . ." on the same matter, and (2) the decision by the 11th Circuit sanctioned " . . . unacceptable judicial conduct in the trial court below, mak[ing] it an appropriate case . . ." for the exercise of the supervisory powers of the Supreme Court. With all due respect, however, there is no conflict between the Eleventh Circuit and any other Circuit, the Petitioner has shown no special and important *public* reasons why this petition should be granted, and the United States Supreme Court should reject the petition for certiorari.

A. Denial Of Certiorari Is Appropriate Because There is No Conflict Between The Eleventh Circuit Court Of Appeals And Other Federal Circuit Courts As to Standards of Judicial Impartiality.

The Petitioner suggests that the guidelines with respect to judicial impartiality applied by the Eleventh Circuit Court of Appeals in this case conflict with the guidelines applied by its sister Circuit Courts of Appeal, and by this Court. The Petitioner contends that *Quercia* v. *United States,* 289 U.S. 466

(1933), sets the standard for judging judicial impartiality. Petition for Writ of Certiorari (hereafter, "Petition"), p. 10. The Petitioner ignores, however, that *Quercia* was recognized as the proper standard by the Eleventh Circuit Court of Appeals in this case. *Coats & Clark, Inc.* v. *Gay,* 755 F.2d 1506, 1512 (11th Cir. 1985). Thus, the standard which Petitioner advocates was applied.

The Petitioner, in his zeal to find error, attempts to revise the standard set forth in *Quercia* by carefully ignoring important portions of the opinion. The standard governing judicial conduct during a trial is not so narrow and simplistic as Petitioner would have the Court believe. The Respondents agree that the trial judge's influence on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' *Quercia,* 289 U.S. at 470. Absent from Petitioner's analysis of the *Quercia* test, however, are additional considerations which permit a trial judge considerable latitude and discretion when conducting a trial. In *Quercia,* this Court held that ". . . the judge is not a mere moderator, but is the governor of the trial for the purposes of assuring its proper conduct and of determining questions of law." *Id.* at 469. Moreover, in another case cited by Petitioner in support of his argument, the Second Circuit Court of Appeals recognized that "[e]very judge has his own individual manner of conducting a trial and, of necessity, must have great leeway in so doing. Even appellate decisions cannot reduce the judicial personality to a common colorless denominator." *United States* v. *Grunberger,* 431 F.2d 1062, 1067 (2d Cir. 1969) (quoting Judge Moore, dissenting in *United States* v. *Guglielmini,* 384 F.2d 602, 608 (2d Cir. 1967)). In *Quercia,* this Court further said that ". . . it is within [the trial judge's] province, whenever he thinks it necessary, to assist the jury at arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes clear to the jury that all matters of fact are submitted to their determination." *Quercia,* 289 U.S. at 469. And finally, to use language from another case

cited by Petitioner, "... the trial judge should be permitted considerable attitude (sic) in dealing with counsel, ruling on objections, and keeping the trial moving ..." *United States* v. *Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1959).

Although the full *Quercia* test was not properly delineated by Petitioner, the Eleventh Circuit Court of Appeals clearly balanced all of the above-cited factors when reaching the decision that "[t]here was no plain error requiring a reversal." *Coats & Clark, Inc.*, 755 F.2d at 1512. The court not only cited the language in *Quercia* upon which the Petitioner relies most heavily, *id.* at 1512, but the court also recognized that

> [A] federal judge is not a "mere moderator of proceedings." (Citations omitted). Rather, he possesses broad powers to "comment on the evidence, . . . question witnesses [in order to] elicit facts not yet adduced or clarify those previously presented, . . . and [to] maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion . . .
>
> One of the most demanding tasks of a trial judge is to keep a trial within proper bounds and to move it along as expeditiously as the ends of justice will permit, without taking frequent recesses to admonish witnesses or counsel in the absence of the jury. Firm but impartial [illegible]ds are required. *Id.* at 1512.

Thus, it is clear that the Eleventh Circuit Court of Appeals, Second Circuit Court of Appeals, and other Circuit Courts of Appeal are adhering to the rule of law set forth in *Quercia* in 1933. Petitioner's contention that the opinion of the Eleventh Circuit is in conflict with this Court, as well as the Second Circuit and others, is without merit. Petitioner's petition for certiorari to the Supreme Court is based on nothing more than a disagreement as to the application of the uniform "standard."

Petitioner's frustration with the application of the *Quercia* test is no more evident than in the extensive discussion in his brief in which Petitioner "... suppose[s] that the Second Circuit would have reversed under these facts." Petition, p. 16.

Petitioner cites five categories of judicial misconduct which he feels are unique to the Second Circuit: (1) marked impatience, (2) contrasting treatment of witnesses, (3) criticism of counsel, (4) mentioning of insurance company and (5) derogation of defendant's testimony. This brief in opposition will not address these assertions at this time because these points of law are more appropriately addressed in the discussion concerning the exercise of the supervisory powers of this Court.

B. Denial Of Certiorari Is Appropriate Because The Decision By The Eleventh Circuit Court of Appeals Did Not Sanction A Departure From The Accepted Course Of Judicial Proceedings Warranting The Exercise Of The Supervisory Powers Of This Court.

Petitioner contends that the trial judge gave the impression to the jury that the court was prejudiced against his case, thereby denying Petitioner his constitutional right to a fair trial. The task of establishing this allegation is made more onerous, however, by his counsel's failure to make timely objections during the course of the trial. Thus, the Eleventh Circuit Court of Appeals properly recognized that the trial court was not afforded an opportunity to correct itself, if it committed error, and stated that "[a]though not precluded, appellate review is limited to review for plain error." *Coats & Clark,* 755 F.2d at 1511 (quoting *Newman* v. *A. E. Staley Mfg. Co.,* 648 F.2d 330, 335 (5th Cir. 1981).

In support of his contention, Petitioner lists five different categories of judicial misconduct which he alleges are present in the case at bar. The incidents to which Petitioner refers do not show antagonism or partiality, however, but rather show nothing more than the trial court exercising its discretion in controlling the trial proceedings. *United States* v. *Socony-Vacuum Oil Company,* 310 U.S. 150, 230 (1940); *Swift* v. *Southern Railway Company,* 307 F.2d 315, 321 (4th Cir.

1962). Thus, in a unanimous decision, the Eleventh Circuit Court of Appeals, upon reviewing the *whole* record, held that

> [t]he context in which the judge's remarks were made makes it clear that [Petitioner] displayed a pattern of evasiveness while on the stand, which mandated firm intervention by the court. Understandably, the judge's remarks grew somewhat harsher as [Petitioner] persisted in his habit of evading the questions or responding to simple questions with extended remarks tailored to his self-interest . . . We are left with the impression that the trial court's impatience was justified.

Coats & Clark, Inc., 755 F.2d at 1512.

Petitioner admits that "each case turns on its own facts and the actions of the trial judge [in the present litigation] may not rise to the same level as those [cases] criticized in any one of the specific [aforementioned] categor[ies]." Petition, p. 16. The cases cited by Petitioner involve instances of judicial impropriety far more egregious than any possible construction that could be given to the trial judge's conduct in the case at bar. This Court wisely stated in *Glasser* v. *United States*, 315 U.S. 60 (1942) that "[w]e must guard against the magnification on appeal of instances which were of little importance in their setting." *Id.* at 82. This Court "should [also] be loath to read too much into the cold black and white of a printed record." *Ah Kee Eng*, 241 F.2d at 161.

The following paragraphs will respond to the five categories cited by Petitioner. The evidence will show that the decision by the Eleventh Circuit Court of Appeals did not sanction a departure from the accepted course of judicial proceedings.

1. Marked Impatience.

The trial judge is empowered with great discretion to keep a case moving within bounds of reason, *Socony*, 310 U.S. at 230; *Swift*, 307 F.2d at 320, especially when concerning the extent of cross-examination, *Alford* v. *United States*, 282 U.S. 687 (1931), and the refusal of testimony that is "merely cumulative in nature." *Socony*, 310 U.S. at 230. Continued questioning on matters already covered in detail may require

judicial admonition of counsel. *Miley* v. *Delta Marine Drilling Company,* 473 F.2d 856, *rehearing denied* 572 F.2d 1405, *cert. denied* 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d 89 (1973).

Petitioner erroneously contends that the trial judge abused this discretion. Petitioner's reliance upon *United States* v. *Coke,* 339 F.2d 183 (2d Cir. 1964) as direct authority in support of his argument is unfounded if for no other reason than in *Coke,* counsel made timely objection. The standard of review was not one of plain error, as it is in the present case. Moreover, while marked impatience was one of the elements cited by the Second Circuit Court of Appeals, the *Coke* court seemed to attach great importance to the trial judge's repeated rebukes and disparaging remarks that were directed at defense counsel, factors not present in the trial of the case at bar.

Petitioner cites several alleged instances of impatience which will be addressed in the order in which they appear in the Petition. First, Petitioner contends that he was denied his right to a fair trial and deprived of due process of law by the trial court's unequal treatment of witnesses. Respondents were allowed to present a witness out of turn "because of difficulties about a witness not being available right at this minute." T-610, L.12-23, reprinted at App. A., p. A-1. Petitioner maintains that the trial court should have reciprocated this flexibility, later in the trial, when one of Petitioner's witnesses was late. It is not an abuse of discretion, however, for a court to adhere to a policy of not delaying trial to wait for a witness, *Maxey* v. *Chapman,* 224 F.2d 574 (8th Cir. 1955); *Schwartz* v. *Koutsubo,* 345 F.Supp. 1018, aff'd 485 F.2d 681 (D.C.Pa. 1972), but the policy should be applied evenly to both parties.

The trial court's failure to delay the trial for Petitioner was not an abuse of discretion. The trial court did not recess the trial for plaintiff's counsel, but merely agreed, with consent of opposing counsel as Petitioner suggests, to present a witness out of turn. Petitioner, however, off the record, asked the court for a recess. Thus, the situations are clearly distinguishable and the trial court applied evenhandedly the policy

of not delaying the trial to wait for a witness. Furthermore, Petitioner ignores the fact that ultimately the recess requested by Petitioner's counsel was granted. T-1207, L. 25 through T-1208, L. 5, reprinted at App. A, p. A-2.

After the trial court's preliminary denial of Petitioner's motion for recess, Petitioner was called to the stand on his own behalf for the second time. His testimony in this appearance concerned matters which had already been ruled irrelevant by partial summary judgment dismissing Petitioner's counterclaim. *Coats & Clark, Inc.*, 755 F.2d at 1509-1511. The trial court, therefore, was well within its discretion in commenting to defense counsel that the impending testimony was "merely cumulative in nature." *Socony*, 310 U.S. at 230. It is noteworthy that when the court finally relented from its refusal to delay the trial for the tardy witness, defense counsel made no effort to bring the Petitioner to the stand for further testimony. Moreover, after considering the record as a whole, the Eleventh Circuit Court of Appeals, without dissent, concluded that ". . . after a careful review of the cold, lifeless record, we are left with the impression that the trial judge's impatience was justified." *Coats & Clark, Inc.*, 755 F.2d at 1512.

2. Contrasting Treatment of Witnesses.

It is within the sound discretion of the trial court to elicit truth, *United States* v. *Breen*, 96 F.2d 782, 784 (2d Cir. 1938), to limit repetitious or cumulative testimony in interest of moving along the trial, *Socony*, 310 U.S. at 230, to clarify evidence previously presented, *Moore* v. *United States*, 598 F.2d 439, 442 (5th Cir. 1979), and to comment on the evidence. *Quercia*, 289 U.S. at 470. Each and every excerpt cited by Petitioner exemplifies the proper exercise of discretion by the trial court. A review of the following excerpts will reveal that Petitioner was not denied a fair trial and that the trial court's comments were "largely justified, . . . mandat[ing] firm intervention by the court." *Coats & Clark, Inc.*, 755 F.2d at 1512.

Petitioner unfairly juxtaposes a moment of levity between the trial court and Respondent's counsel against an instance

in which the trial court admonished Petitioner's counsel for spending 40 minutes on a 10-minute witness. Petition, p.20. Not only was the trial court well within its judicial discretion in admonishing Petitioner's counsel so as to move the trial along, but the record is replete with instances in which the trial court was equally as lighthearted with Petitioner. *See e.g.,* T-150, L.9 through T-151, L-4, reprinted at App. A, p. A-3.

Petitioner claims that the trial judge "help[ed] plaintiff's expert . . . avoid defendant's cross-examination," and thereby contributed to the denial of a fair trial before an impartial jury. Petition, p.20. Petitioner claims that not only did the trial judge suggest a means by which the witness could avoid answering a question, but that the witness' later denial of any knowledge concerning the question can be attributed to the trial court's suggestion. Petition, p.21. Petitioner has failed to inform this court, however, that the jury was absent at the time of this exchange and that the witness offered a comprehensive and detailed explanation for his lack of knowledge. T-366, L.8 - T-368, L.4, reprinted at App. A., p. A-4.

Petitioner's next two contentions relate to the trial court's handling of two expert witnesses appearing on behalf of Petitioner. Petitioner claims that the trial court was "pre-dispos[ed] to grant [a] new trial if [Petitioner's] 'contaminated' expert, Adams," testified and plaintiff subsequently lost the trial. Petition, p. 22. A careful reading of the record, however, will show that the trial court merely stated that if Petitioner's expert had been present in the court room during other testimony on matters in which Petitioner's expert was to testify, Respondent's counsel would ". . . have *basis* for a motion for a new trial" (emphasis added). T-1186, L.1-6, reprinted at App. A, p. A-6. Moreover, when the trial court, on its own motion, excluded Adams' irrelevant testimony concerning the maintenance procedures on sprinkler systems used at nuclear reactors, the court was well within its discretion. T-1213, L.5-16, reprinted at App. A, p. A-7. It is not error for a trial court to exclude evidence without objection, on its own motion. *Alquero* v. *Duenas,* 319 F.2d 40, 42 (9th Cir. 1963). The trial court's treatment of Petitioner's main

expert, Donnelly, was also within the trial court's broad discretion to move the trial along and exclude irrelevant material. T-1132, L.2-22, reprinted at App. A, p. A-8. *Socony*, 310 U.S. at 230; *Miley*, 573 F.2d at 857.

Respondents do not deny that their counsel used the term "believed" at various instances in his cross-examination of the Petitioner. Petitioner's counsel, however, did not object to the use of the term. Later in the trial, the trial court did not "encourag[e] plaintiff's counsel to object to" the use of the term "believed" by one of Petitioner's witnesses. Petition, p.23; T-1201, L.10 through T-1203, L.1, reprinted at App. A, p. A-9. Any gratuitous motions by the trial court were well within the trial court's sound discretion to clarify the evidence for the benefit of the jury. *Moore*, 598 F.2d at 439; *Alquero*, 319 F.2d at 42.

A careful reading of the remainder of the excerpts cited by Petitioner will reveal that in each and every instance, the trial judge was well within his sound discretion to clarify and comment on the evidence, *Quercia*, 289 U.S. at 470, to elicit truth by cross-examining witnesses, *United States* v. *Breen*, 96 F.2d at 784, and to maintain the pace of the trial. *Moore*, 598 F.2d at 493. Petitioner contends that the trial judge abused this discretion and cites *United States* v. *Grunberger*, 431 F.2d 1062 (2d Cir. 1969) as support for this proposition. Petitioner's reliance on *Grunberger*, however, is tenuous because the holding in *Grunberger* was not based solely on even primarily on contrasting treatment of witnesses. Petition, p.19. In *Grunberger*, in addition to extensively questioning witnesses on his own, the trial judge improperly charged and usurped the function of the jury by indicating that a particular statement by defendant was an admission of guilt. *Grunberger*, 431 F.2d at 1069. The prosecutor was also allowed to state his personal opinion as to the credibility of the evidence. *Id.* at 1068. In the case at bar, however, at no time did the trial court usurp the jury's function or become an advocate for the plaintiff. Upon review of the whole record, the Eleventh Circuit Court of Appeals was ". . . not convinced that the jurors may have perceived the trial judge as partial

toward the plaintiff and biased against the defendant." *Coats & Clark, Inc.*, 755 F.2d at 1512.

3. Criticism of Counsel.

Petitioner has mischaracterized the relationships between the trial court and the counsel for the two parties. The record will show that plaintiff's counsel did not enjoy a "joking relationship" with the trial judge, Petition, p. 27, nor was there a "running battle" between the court and defense counsel, *United States* v. *Persico*, 305 F.2d 534, 540 (2d Cir. 1962), in which the bench "belittle[d] and humiliate[d] counsel in the eyes of the jury." *Ah Kee Eng*, 241 F.2d at 161. With all due respect, it is important to note that Petitioner's present counsel was not present at the trial and these contentions are, therefore, based on a "cold, black and white of a printed record." *Id.*

Most of the interjections by the trial judge to which Petitioner objects were "largely justified." *Coats & Clark, Inc.*, 755 F.2d at 1512. As was more fully described in the section concerning marked impatience, *supra*, the trial judge's reference to "filibustering" was prompted by defense counsel's purposeful delaying of the trial. T-1199, L.21 through T-1200, L.6; T-1203, L.17 through T-1204, L.6, reprinted at App. A, p. A-11. Moreover, because Petitioner was recalled to testify as to matters that were irrelevant and cumulative in nature, *Coats & Clark, Inc.*, 755 F.2d at 1509-1512, the trial court was well within its discretion to exclude Petitioner's testimony. *Socony*, 310 U.S. at 230.

Petitioner further contends that the trial court damaged the credibility of his counsel at trial through "caustic" and accusatorial remarks. Petition, p. 28. It is clear from a reading of the trial record that the trial court was merely trying to be evenhanded with both parties. The statement to which Petitioner objects was made immediately after a bench conference, which presumably was to discuss propriety of the line of questioning by the Respondent's counsel. The trial court was, therefore, within its discretion to maintain the pace of the trial. T-1119, L.25 through T-1120, L.14, reprinted at App. A, p. A-12.

The remainder of Petitioner's contentions concerning criticism of counsel, are purely speculative. A fair reading of the excerpts cited by Petitioner will show that the trial court was evenhanded in his treatment of the parties involved and had no effect on the perceptions of the jury.

The failure of Petitioner's trial counsel to timely object during the trial causes Petitioner to carry the heavy burden of establishing plain error. *Newman,* 648 F.2d at 335. Moreover, Petitioner admits that the cases which he cites for authority involve ". . . more egregious circumstances than the record here . . ." reveals. Petition, p. 27. Hence, the Eleventh Circuit Court of Appeals found that most of the comments to Petitioner's counsel were "largely justified." *Coats & Clark, Inc.,* 755 F.2d at 1512.

4. Mentioning of insurance company.

Petitioner contends that the case of *Brown* v. *Walter,* 62 F.2d 798 (2d Cir. 1933) stands for the proposition that if a trial judge, during voir dire, mentions that a certain insurance company is an interested party, grounds exist for a new trial. Petition, pp. 32-33. Petitioner's reading of *Brown* is strained. Voir dire questioning rests in the sound discretion of the trial court. *Hinkle* v. *Hampton,* 388 F.2d 141, 144 (10th Cir. 1968). During voir dire by the trial court, questions were asked concerning the insurers of both parties, and no objection was raised. T-19, L. 9-24, reprinted at App. A, p. 13. Moreover, at no other time during the trial did any of the parties, including the trial judge, make mention of Petitioner's insurer.

5. Derogation of defendant's testimony.

Petitioner claims that the trial judge undermined his credibility during the trial. The excerpts to which Petitioner cites do not justify this conclusion. Indeed, the United States Court of Appeals held that "[t]he context in which the judge's remarks were made makes it clear that [Petitioner] displayed a pattern of evasiveness while on the stand, which mandated firm intervention by the court. Understandably, the judge's remarks grew somewhat harsher as [Petitioner]

persisted in his habit of evading questions or responding to simple questions with extended remarks tailored to his self-interest." *Coats & Clark, Inc.*, 755 F.2d at 1512. *See e.g.*: T-1200, L.18 through T-1201, L.20, reprinted at App. A, p. A-14.

Petitioner's reliance on *Quercia* and *United States* v. *Salazar*, 293 F.2d 442 (2nd Cir. 1961) is misplaced. In *Salazar*, the trial court made "gratuitous and unnecessary comments which sarcastically and relentlessly discredit Salazar." *Salazar*, 293 F.2d at 444. Petitioner admits that the trial court's conduct does not "fit squarely within the ambit of either *Quercia* or *Salazar*," and that the trial court's "comments and conduct toward [Petitioner] were less than direct and not totally unprovoked." Petition, p.36.

It is apparent from the previous discussion that the denial of certiorari is appropriate because the decision by the Eleventh Circuit Court of Appeals did not sanction a departure from the accepted course of judicial proceedings. "Although the trial judge stepped close to the line of neutrality in this case . . ." a unanimous panel of the Eleventh Circuit Court of Appeals held that the trial court did not abuse its discretion. *Coats & Clark, Inc.*, 755 F.2d at 1512. With all due respect, the major purpose of the supervisory power is to protect the integrity of the court, rather than vindicate a constitutional right of a defendant. *United States* v. *Payner*, 447 U.S. 727, 747 (1980) (dissenting opinion). For the reasons stated herein, therefore, the decision of the Eleventh Circuit Court of Appeals did not and does not undermine the integrity of the judicial system.

CONCLUSION

For the reasons stated, plaintiff respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

T-610, L. 12-23

THE COURT: Now, members of the jury, the plaintiffs have not quite presented all the evidence that they want to present. But because of difficulties about a witness not being available right at this minute, the defendants are going to go ahead and start presenting the defendant's evidence. But the plaintiff is still going to introduce a little more evidence after lunch today. In other words, they have not completed their case but they have almost completed it. And so that we may go ahead without delay, the defendants are going to go ahead and then we'll break back in after lunch and let the witnesses for the plaintiff be heard.

T-1207, L. 25 through T-1208, L. 5

THE COURT: All right. I said I wasn't going to do it, but I'm going to do it. We're going to wait just a few minutes and see if the witness who is supposed to have been here gets here. So we'll take a little short break so that you can be more comfortable.

(Brief Recess)

T-150, L. 9 through T-151, L. 4

Q. Mr. Gay, let me show you something that's been marked as Plaintiff's Exhibit 6 in this case, and it purports to be a diagram of the General Bonded Warehouse showing where cotton was stored. It's a diagram that was drawn for us by your son-in-law, Mr. Randall Hatcher. Do you recognize it as being such a diagram?

MR. ECKL: Your Honor, he probably wouldn't know. We would agree that it is.

MR. WITHERS: I believe he was present at Mr. Hatcher's deposition.

THE COURT: Well, your lawyer says that he will agree that that is a diagram. Are you willing to agree with your lawyer?

THE WITNESS: I'm the one that's got to tell the truth.

THE COURT: That's right, the lawyer doesn't have to tell the truth.

(Laughter)

THE COURT: That's one of the fringe benefits.

THE WITNESS: You make me regret I didn't become a lawyer.

T-366, L. 8 through T-368, L. 4

MR. ECKL: Can I ask him some questions before we take him down and then later if the Court rules that those questions are admissible just read them to the jury rather than spending a lot of time having Mr. Thomas—

THE COURT: You can go ahead and ask him about them, and you can handle it that way. But I don't think I'm sufficiently informed about it to rule on the admissibility right now.

MR. ECKL: If everybody has no objection to that, then we'll just kind of take it a little series of questions here, and if the Court later rules that they're admissible—

THE COURT: The witness may say he doesn't know anything about it anyway. That would solve the whole thing, wouldn't it?

MR. ECKL: Please don't suggest to him—

THE WITNESS: Well, I've heard enough.

MR. WITHERS: Just so the record's clear, I have no objection to that procedure. Obviously the objection to the documents are reserved.

MR. ECKL: Let's make sure that the record reflects that the jury is not presently in the Courtroom as I ask this series of questions.

BY MR. ECKL:

Q. Mr. Thomas, I'm going to hand you Defendant's Exhibit Number 4 and I'll ask you whether or not that's a form with which you are familiar.

A. No, sir, it is not. I've never seen one of FM's forms to tell you the truth.

Q. Do you know who gets a copy of that form?

A. I don't know. I really don't.

Q. All right, sir. Your company doesn't use such a form?

A. No, we don't.

Q. Let me hand you D-5, and that's captioned underwriting survey?

A. Yes.

Q. Are you familiar with D-5?

A. No, I'm not. You must remember these guys are my competitors.

Q. Y'all don't have a similar form that you use?

A. No, we really don't. Factory Mutual—well, let's put it this way, Factory Mutual and the IRI, which is their stock company competitor, use vey elaborate forms for this sort of thing. And these forms would apply to any risk. And, see, I'm a cotton underwriter, and I just wouldn't stumble into this sort of thing.

T-1186, L. 1-6

THE COURT: Well, the rule is that all witnesses were supposed to stay out of the Courtroom. I'm not going to say I'm not going to let him testify. I note in your objection, Ms. Roberson, that if I let him testify and the case comes out contrary to the way you see it to come out, of course, you'll have basis for a motion for a new trial.

T-1213, L. 5-16

Q. What did this involve at Plant Hatch concerning different regulatory agencies in relation to your work?

A. Well, we had to work right with nuclear people who—regulatory people, NRC, and we had to—when they'd have modifications of the sprinkler system. They had a shutdown which they would call—they had two units, and one unit was shut down. And this would be remodified, the sprinkler systems. If they remodified the pipes in the lines that lead into the reactor building—

THE COURT: Do we need to know all about that? This is not a nuclear plant here we're talking about. Ask him what you want to ask him about this case. Go on.

T-1132, L. 2-22

Q. Now, your degree is in mechanical engineering, is it not?

A. Yes, sir. But I'm a registered electrical engineer in five states.

Q. Just briefly what is the field of mechanical engineering. What does it include?

A. It includes plumbing, heating and air conditioning. That's the main field. A lot of people think of a mechanical engineer as an automotive engineer. That's one branch of mechanical engineering. But my particular branch was heat transfer, which got into heating and air conditioning, plumbing and nuclear reactors.

Q. And then you picked up a certification or license—are you licensed as an electrical engineer?

A. Yes. For the last twenty years, due to my—

THE COURT: Well, the answer is yes.

THE WITNESS: Yes, the answer is I'm licensed in five states as a registered professional electrical engineer. I took the electrical engineering exam.

THE COURT: So the answer is yes.

THE WITNESS: Yes.

T-1201, L. 10 through T-1203, L. 1

BY MR. McKINLEY:

Q. Mr. Gay, would you describe how many of those would've been at the warehouse? Would they have been around the warehouse at the time of the fire?

A. They would've been—based on the cotton there—of course, I might add when the cotton was salvaged these bands here did not break as readily as the wire baling bands. This was one of the reasons that in the picture you saw the cotton just fluffed over like a snowstorm, is because the wire will break a lot quicker in the heat.

MR. WITHERS: Your Honor—

THE COURT: He hasn't been qualified as any expert on which one would break first and which one would break next. You said you put him up there just to ask him if those things were at the warehouse, and he stated that. Now what else are you going to ask him?

BY MR. McKINLEY:

Q. Mr. Gay, I also show you this. Would this be related to what that is?

A. This is a band here, and Mr. Hatcher believes that some—

THE COURT: Mr. Hatcher believes—you can't testify about what Mr. Hatcher believes.

THE WITNESS: And I believe—

THE COURT: And you can't testify about what you believe. You can testify about facts. This man hasn't been qualified as an expert on—

THE WITNESS: Still—

THE COURT: Just a minute, just a minute.

THE WITNESS: All right, sir.

THE COURT: He hasn't been qualified as an expert in this business.

BY MR. McKINLEY:

Q. Mr. Gay, just tell us what that is.

A. This band was also found on the fire site.

Q. What was that used for in the warehouse at the time of the fire or prior to the fire?

A. It had cotton on it. So based on what we believed it was used on some of the cotton.

MS. ROBERSON: Objection to the witness testifying to what he believed, not what he knows.

T-1199, L. 21 through T-1200, L. 6;
T-1203, L. 17 through T-1204, L. 6

MR. McKINLEY: Defendant calls Earl Adams.

(Pause)

MR. McKINLEY: Your Honor, I'm informed Mr. Adams is scheduled to arrive here at 9:30, in eight minutes. I apologize he's not here at this minute.

THE COURT: Well, we're not going to wait on him. We're not going to wait on him. We don't wait on witnesses. What else do you have?

MR. McKINLEY: Mr. Gay, would you please take the stand?

Q. Mr. Gay, on this particular item, explained this as a baling wire or for cotton. And you mentioned you found cotton on these wires. Would you describe that? Is that shown on that?

A. Here's the cotton right here. Also there's some right here.

Q. Now, if you would also, please, would you describe what exactly this is and how that is used?

A. This is the buckle—

MS. ROBERSON: Your Honor, I object to this line of testimony as irrelevant to any issue—

THE COURT: I don't see any relevance—what are you doing, filibustering until your other witness gets here? Is that what you're doing? I noticed you were just looking at your watch.

T-1119, L. 25—T-1120, L. 14

MR. ECKL: Your Honor, may we approach the bench, counsel approach the bench?

(Conference at the bench)

BY MR. WITHERS:

Q. Mr. Donnelly, who hired you in this matter?

A. A Mr. Harold Brown.

Q. Where does he work?

MR. ECKL: Your Honor, may I approach the bench?

THE COURT: Well, you questioned the expert witnesses put on the stand by the other side about who employed them, even about how much they were paid an hour an so on. He would have the same right.

(Inaudible conversation)

THE COURT: Well, let's see. Take the jury to the jury room, Mr. Marshal.

T-19, L. 9-24

And there is an insurance company which is interested in this matter insofar as Coats and Clarke is concerned, and that insurance company is the Insurance Company of the State of Pennsylvania. Any member of the jury panel and officer of or an agent for or a stockholder in or an employee of the Insurance Company of the State of Pennsylvania? If so, would you stand and tell us about it at this time?

And there is another insurance company that is interested one way or another in the outcome of this case from the standpoint of defendant, Mr. Gay, and that is the Hanover Insurance Company. Is any member of the jury panel an officer of or an agent for or an employee of or a stockholder in the Hanover Insurance Company? If so, will you stand and tell us about it at this time?

T-1200, L. 18—T-1201, L. 20

BY MR. McKINLEY:

Q. Mr. Gay, I'm going to show you this item and ask you if you would please tell us what it is and whether that was at the fire scene at the time of the fire.

A. When the bales of cotton came in from Coats & Clark, they had two ways of banding them. One—the latest way and apparently it's cheaper because of buckles and so forth is—

MR. WITHERS: I object to the comment that it's cheaper—

THE COURT: I sustain the objection. The question was were things like this at the warehouse. Now, what's the answer to that?

THE WITNESS: The baling wire that you saw was there, and also the cotton had these on it. Up until 1982 I hadn't seen any of the baling wire. Everything came in had this band around it.

BY MR. McKINLEY:

Q. Mr. Gay, would you describe how many of those would have been at the warehouse? Would they have been around the warehouse at the time of the fire?

A. They would've been—based on the cotton there—of course, I might add when the cotton was salvaged these bands here did not break as readily as the wire baling bands. This was one of the reasons that in the picture you saw the cotton just fluffed over like a snowstorm, is because the wire will break a lot quicker in the heat.

(3)

85-275

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARLOS G. GAY

Petitioner,

V.

COATS & CLARK, INC.
and
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
and
WHIRLPOOL CORPORATION
and
ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY

Respondents,

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

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RESPONSE OF WHIRLPOOL CORPORATION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Certiorari should be denied because this case presents no issue for review by this Court as the Eleventh Circuit Court of Appeals correctly applied the plain error standard of review. The plain error standard of review is uniformly accepted and applied by all federal courts of appeal as the proper standard of review when no contemporaneous objection is made at the time of trial. The Eleventh Circuit applied the plain error doctrine to the record as a whole and concluded that reversal was not appropriate. No conflict exists between the Eleventh Circuit's decision and that of other federal courts, therefore, certiorari should be denied.

It is a well-established principle that although a trial judge has a duty to conduct the trial in a fair and impartial manner, the judge has wide discretion in managing the proceedings. In Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933), this Court recognized that the judge must often play an aggressive role in the trial in order to maintain control in the courtroom, rather than that of a passive spectator. The Eleventh Circuit gave recognition to this principle and expressly followed Quercia in rendering the decision below.

The record of the trial demonstrates that Mr. Gay was belligerent, disrespectful and nonresponsive throughout his testimony. To assure the continuation of an orderly and expedient trial, it was continually necessary for the court to

intercede in the proceedings and admonish the witness. In so doing, the trial court did not manifest any bias or prejudice against Mr. Gay. Judge Elliott was simply fulfilling his proper role as manager of the conduct and procedure of the trial.

The Eleventh Circuit Court of Appeals followed the guidelines set forth by this court and other federal courts of appeal and found that the trial judge's actions were within the bounds of permitted conduct. The Eleventh Circuit reviewed the record as a whole to reach that conclusion. Petitioner simply seeks a new forum to air its characterizations of the record. Petitioner's petition for writ of certiorari ought therefore be denied.

REASONS FOR DENYING WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE NO REASON EXISTS FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION OVER THE FEDERAL JUDICIARY. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS AND THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

This case presents no issue for review by this Court as the Eleventh Circuit Court of Appeals correctly applied the plain error rule. The Eleventh Circuit provided petitioner Gay with opportunity for full appellate review of Gay's claims of partiality and stated as follows:

> We have considered the record as a whole, including the judge's charge to the jury, rather than focusing narrowly on instances of allegedly improper conduct referred to in briefs of counsel. Newman v. A.E. Staley Mfg. Co., 648 F.2d 330, 345 (5th Cir. Unit B

> 1981). We note at the outset that the testimony of Gay, called as plaintiff's first witness for the purpose of cross-examination, extended through 184 pages of the transcript and that his testimony alone accounted for 360 of the 1,120 pages of the trial testimony. We recognize how crucial his testimony and his credibility were to the defense. The judge's interjections were not directly denegrating as to either. Many of them did occur while Gay was on the stand or his counsel was illiciting testimony, but they were largely justified. The context in which the judge's remarks were made makes it clear that Gay displayed a pattern of evasiveness while on the stand, which mandated firm intervention by the Court. Understandably, the judge's remarks grew somewhat harsher as Gay persisted in his habit of evading questions or responding to simple questions with extended remarks tailored to his self-interest. . . . there was no plain error requiring a reversal.

[Emphasis Supplied]

Petitioner concedes that this was a lengthy trial and that appellate scrutiny requires review of the entire record as a

whole. (Petitioner's Brief, pp. 7, 16-17.) Yet, despite the Eleventh Circuit's clear rejection of these same contentions, petitioner seeks a second review from this Court. Petitioner is not entitled to a "second bite" of the appellate apple any more than petitioner is entitled to a "second bite" at trial.

Petitioner concedes that the Eleventh Circuit applied the correct standard for review and that each case turns on its own facts (Petitioner's Brief, pp. 13-14). Petitioner, however, persists in mischaracterizing and partially citing portions of transcript to demonstrate improper trial court conduct. Respondent believes, and demonstrated to the satisfaction of the Eleventh Circuit Court of Appeals, that these contentions are

wholly unsupported by the evidence. In fact, the Eleventh Circuit concluded that the trial court's conduct was justified. This Court's review of the trial and appellate courts' opinions would establish no new rule or standard of review but would only serve the dangerous and improper function of encouraging endless litigation over characterizations of transcript and argument by new counsel.[1]

---

[1] In his brief petitioner implies that trial and appellate counsel (as well as the trial judge) failed to properly perform their duties (Petitioner's brief at pp. 30-32, 38). It is noteworthy that different attorneys represented petitioner at the trial and appellate level, and yet new counsel represents petitioner on this petition for a writ of certiorari. In short, petitioner has expressed dissatisfaction with all elements of the trial. Respondent believes that this dissatisfaction arises from the result and does not provide a basis for a new trial or second appeal.

In short, as petitioner in fact concedes, the trial judge's comments do not meet the standard for reversal set forth in earlier opinions of this Court. (Petitioner's Brief, p. 36.) Rather, this case demonstrates the extent to which due process can delay a plaintiff's established right to recovery since petitioner has lost not only at trial but in post-trial motions, on appeal, and in motion for rehearing en banc. Litigation must conclude. Further, review in this case would serve only to encourage litigation without end and without regard to the underlying merits of the controversy as judged by a trial court and jury.

A. The Standard of Review Utilized by the Eleventh Circuit Court of Appeals in Rendering the Decision Below is Uniformly Accepted and Applied by all Federal Courts of Appeal.

The petitioner did not make objection to the trial court's comments at the time of trial which are now claimed to have been prejudicial. Petitioner concedes that the Eleventh Circuit Court of Appeals was therefore limited in its review to review for "plain error". Morreale v. Downing, 630 F.2d 286 (5th Cir. 1980).

The "plain error" standard of appellate review is uniformly recognized by the federal courts as the proper standard of review when no contemporaneous objection is made at the time of trial. Under the "plain error" standard, reversal is required only in those exceptional cases where the error has caused a "miscarriage of justice" by seriously affecting the "fairness, integrity or public reputation of judicial proceedings." See, e.g., Morris v.

Getscher, 708 F.2d 1306 (8th Cir. 1983); Rojas v. Richardson, 703 F.2d 186 (5th Cir. 1983).

Petitioner relies almost exclusively on the decisions of the Second Circuit Court of Appeals to support his contention that the decision of the Eleventh Circuit is in conflict with the decisions of other federal courts of appeal. However, if these decisions are examined in the context in which they are rendered, it is readily apparent that no conflict exists.

All of the Second Circuit decisions relied upon by petitioner to support its claim of a conflict are criminal, not civil cases. The Second Circuit has repeated emphasized that although the "plain error" language is utilized by the Courts in both types of cases, the standard of review is more narrowly

defined in a civil suit as "fundamental error." In the case of Modave v. Long Island Jewish Medical Center, 501 F.2d 1065, 1072 (2nd Cir. 1974), the Court stated:

> Preliminarily it is worth noting that the "plain error" phrase is found in F.R.Cr.P. 52, not in the civil rules. Except perhaps for errors that could not have been corrected on proper objection, the doctrine applicable in civil cases is the more limited one of "fundamental error", see New York Central R.R. v. Johnson, 279 U.S. 310, 318-319, 49 S.Ct. 300, 73 L.Ed. 706 (1929) - an error so serious and flagrant that it goes to the very integrity of the trial. (Citations omitted)" [Emphasis supplied]

See also Brenner v. World Boxing Council, 675 F.2d 445 (2nd Cir. 1982), certiorari denied 103 S.Ct. 79 (1982).

Petitioner has not cited a single civil case involving similar conduct by a trial judge which resulted in a reversal

by a court of appeals. Indeed, petitioner concedes that the cases petitioner relies upon involve much more "egregious circumstances than the record here would reveal," in addition to involving a less stringent standard of review. (Petitioners Brief, p. 27). Furthermore, the cases and statutes relied upon by petitioner are completely inapplicable to the circumstances present in the instant case.

For example, petitioner relies upon the case of United States v. De Sisto, 289 F.2d 33 (2nd Cir. 1961). (Petitioner's Brief, p. 26). De Sisto involved an appeal from a conviction for obstruction of interstate or foreign commerce. On appeal, the defendant argued that the trial judge's conduct was prejudicial and deprived him of a fair trial. The Second

Circuit Court of Appeals revised and remanded the trial court's decision on the grounds that the judge's conduct conveyed to the jury an impression of partiality.

Although De Sisto involved a reversal by an appellate court for prejudicial conduct by a trial judge, the conduct of the judge was very different in character from that of Judge Elliott in the instant case. In De Sisto, the Second Circuit found that the judge's conduct in extensively questioning witnesses and the defendant himself and in repeatedly expressing outright disbelief in the defendant's alibi created too strong an impression of the court's belief in the defendant's probable guilt.

In the case at bar, none of the conduct referred to by defendant amounted to a direct statement of the Court's

disbelief in the defendant's position. Instead, all of the judge's conduct represented an effort to maintain control of the courtroom and to assist the jury in understanding the evidence, which the court in De Sisto recognized is a proper function of the trial judge.

A second example of petitioner's use of improper and inapplicable legal support is petitioner's reliance upon the federal disqualification statute, 28 U.S.C. section 455 (a) (Petitioner's Brief, p. 39), which states:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Generally, this statute is properly used by a party to a case in conjunction with 28 U.S.C. § 144 to obtain the disqualification of a judge before the

trial. Only in rare instances is it applied to disqualification during trial. This statute does not apply to claims of bias developing during trial which are caused by a party's conduct and the evidence, as petitioner contends in the instant case. See, e.g., United States v. Johnson, 658 F.2d 1176 (7th Cir. 1981); United States v. Haldeman, 559 F.2d 31 (D.C.Cir. 1976), certiorari denied 97 S.Ct. 2641 (1977).

In his brief, petitioner artificially creates a conflict by relying on factually distinguishable cases and statutes and involving a broader standard of review than was properly applied by the Eleventh Circuit Court of Appeals in the case at bar. The Eleventh Circuit Court of Appeals utilized the standard of review uniformly accepted and applied by all

federal courts of appeal when presented with circumstances similar to those in the case at bar. The appellate court applied the "plain error" doctrine to the record as a whole and concluded that reversal was not appropriate. No conflict exists between the Eleventh Circuit's decision and that of other federal courts, therefore, certiorari should be denied.

B. The Eleventh Circuit Court of Appeals Correctly Followed Guidelines of this Court by Finding the Trial Court's Conduct was Necessary and Appropriate.

Petitioner contends that this Court should exercise its supervisory powers over the federal judiciary in order to "re-establish uniform guidelines for courts of appeal to implement the requirement of judicial impartiality." (Petitioner's Brief, p. 10). However, the

guidelines set forth by this Court are clear, and have consistently and uniformly been implemented by the federal courts. These guidelines were applied to the record as a whole by the Eleventh Circuit Court of Appeals, which properly concluded that the trial judge's actions were within his authority to govern the trial. The mere fact of receiving an unfavorable decision provides no basis for this Court to reiterate longstanding principles that were applied by the Eleventh Circuit.

It is a well-established principle that although a trial judge has a duty to conduct the trial in a fair and impartial manner, the judge has wide discretion in managing the proceedings. United States v. Hawkins, 661 F.2d 436 (5th Cir. 1981). In Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933),

this Court fully reviewed the trial judge's role and stated: "in a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." This Court thereby recognized that the judge must play an aggressive role in the trial in order to maintain control in the courtroom, rather than that of a passive spectator. The Eleventh Circuit Court of Appeals gave recognition to this principle and expressly followed Quercia in rendering the decision below.

Petitioner recognizes that when a question of judicial impartiality is raised, "each case necessarily turns on its own facts." United States v. Socony-Vacuum Oil Co., Inc., et. al., 310 U.S.

150, 240 (1940). (Petitioner's Brief, p. 14). The question of impartiality necessarily requires an examination of the record as a whole because it is impossible for this Court, or any court, to identify specific conduct which requires a reversal without consideration of the entire trial. Indeed, it is vital to consider the record as a whole to determine the context in which the judge's conduct took place. This Court stated in Glasser v. United States, 315 U.S. 60, 128 (1942), on reviewing a claim of prejudicial conduct by the trial judge:

> Perhaps the Court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the substantial rights of the petitioners were not affected. The trial was long and the incidents relied on by petitioner's few. We must guard against the magnification on appeal of instances which were of little importance in their

setting. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 240, 60 S.Ct. 811, 852, 84 L.Ed. 1129; Goldstein v. United States, 8 Cir., 63 F.2d 609; United States v. Warren, 2 Cir., 120 F.2d 211.

Petitioner's brief inappropriately contains an argument on the merits of the case. Although consideration of granting a writ of certiorari does not include review of the merits, it is necessary to illustrate that petitioner's "incidents" are presented out of context and petitioner's conclusions are thus without merit.

For example, petitioner contends that, throughout the trial, Judge Elliott evidenced an attitude favorable to respondent's case in that he almost never interrupted the presentation of the respondent's case and was continually antagonistic to petitioner. This

contention is erroneous. There are numerous instances within the transcript where the trial judge interjected comments and admonishments to respondent's counsel and where he aided Mr. Gay with his testimony. (see, e.g.. T-258, lines 8-11; T-268, line 25; T-270, line 2; T-279, line 11; T-301, line 15, T-774, lines 11-13; T-787, 788).

The record of the trial demonstrates that Mr. Gay was belligerent, disrespectful and nonresponsive throughout his testimony. To assure the continuation of an orderly and expedient trial it was continually necessary for the court to intercede in the proceedings and admonish the witness. In so doing, the trial court did not manifest any bias or prejudice

against Mr. Gay. Judge Elliott was simply fulfilling his proper role as manager of the conduct and procedure of the trial.

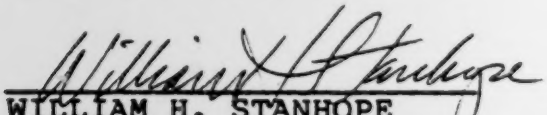
The Eleventh Circuit Court of Appeals followed the guidelines set forth by this Court and found that the trial judge's actions were within the bounds of permitted conduct. The Eleventh Circuit reviewed the record as a whole to reach that conclusion.

CONCLUSION

The Eleventh Circuit Court of Appeals properly applied the "plain error" standard to the record of the entire trial. In doing so, the appellate court followed the guidelines used by other federal appellate courts. Petitioner simply seeks a new forum to air its

characterizations of the record. Petitioner's petition for writ of certiorari ought therefore be denied.

Respectfully submitted,



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